87-415

Supreme Court, U.S.
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No. _____

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

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NORTHERN PLAINS RESOURCE COUNCIL; TONGUE RIVER AGRICULTURE PROTECTION ASSOCIATION; ROSEBUD PROTECTIVE ASSOCIATION; and TRI-COUNTY RANCHERS ASSOCIATION,

Petitioners,

-vs-

THE UNITED STATES OF AMERICA; the INTERSTATE COMMERCE COMMISSION; and the TONGUE RIVER RAILROAD COMPANY,

Respondents.

---o---

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

Whether landowners affected by the construction and operation of a common carrier railroad have standing to challenge the certification of that railroad by the Interstate Commerce Commission when the landowners' challenge is founded upon a provision of the Mineral Lands Leasing Act which generally precludes common carrier railroads from acquiring a federal coal lease.

PARTIES TO ACTION

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The parties to this proceeding are the Northern Plains Resource Council, a Montana non-profit corporation; the Tongue River Agriculture Protection Association, an unincorporated association; the Rosebud Protective Association, an unincorporated association; the Tri-County Ranchers Association, an unincorporated association; the Interstate Commerce Commission, an agency of the United States of America; and the Tongue River Railroad Company, a limited partnership.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO ACTION ii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION OF THIS COURT 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

HISTORY OF THE CASE 4

WHY THE WRIT SHOULD BE GRANTED 6

A. SUMMARY OF ARGUMENT 6

B. THE RULING THAT AFFECTED LANDOWNERS LACK STANDING TO PROTEST THE AUTHORIZATION TO CONSTRUCT A RAILROAD AND ISSUE SECURITIES TO FINANCE CONSTRUCTION IS CONTRARY TO THE

DECISIONS OF THIS COURT OTHERWISE ENLARGING THE CLASS OF PEOPLE WHO MAY PROTEST ADMINISTRATIVE ACTION 7

CONCLUSION 17

APPENDIX A ..... App. 1a

APPENDIX B ..... App. 1b

APPENDIX C ..... App. 1c

TABLE OF AUTHORITIES

UNITED SUPREME COURT CASES: Page

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S. Ct. 827, 25 L.Ed.2d 184 (1970) 7, 9 10, 16

Block v. Community Nutrition Institute, 467 U.S. 340, 104 S. Ct. 2450, 81 L.Ed.2d 270 (1984) 7, 10, 11, 13

Clarke v. Securities Industry Ass'n, 479 U.S. ____, 107 S. Ct. 150, 93 L.Ed.2d 757 (1987) 7, 10, 11, 13, 16

Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. ___, 106 S.Ct. 2860, 92 L.Ed.2d166 (1986) 7, 13

L. Singer & Sons v. Union Pacific Railroad Co., 311 U.S. 295, 61 S. Ct. 254, 85 L.Ed. 198 (1940) 14

OTHER FEDERAL CASES:

Concord Township v. U.S., 625 F.2d 1068 (3rd Cir. 1980) 15

Northern Cheyenne Tribe v. Hodel, Case No. 86-4403, (9th Cir., filed 1986) 5

Northern Cheyenne Tribe v. Hodel, Case No. CV-82-116-BLG (D.Mont., filed 1982) 5

UNITED STATES STATUTES: Page

Mineral Leasing Act., Act of February
25, 1920, C. 5 §2(c),
41 Stat. 438, as amended:
30 U.S.C. §202 ..... 2, 4, 15

Transportation Act, Pub L. 95-473,
92 Stat. 1402, as amended:
49 U.S.C. §10901 ..... 2, 8, 15
49 U.S.C. §11301 ..... 2, 3, 8, 9, 15

No. _____

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NORTHERN PLAINS RESOURCE COUNCIL; TONGUE RIVER AGRICULTURE PROTECTION ASSOCIATION; ROSEBUD PROTECTIVE ASSOCIATION; and TRI-COUNTY RANCHERS ASSOCIATION,

Petitioners,

-vs-

THE UNITED STATES OF AMERICA; and the INTERSTATE COMMERCE COMMISSION; and the TONGUE RIVER RAILROAD COMPANY,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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The Northern Plains Resource Council, a Montana non-profit corporation, Tongue River Agriculture Protection Association, an unincorporated association, Rosebud Protective Association, an unincorporated association, and the Tri-County Ranchers Association, an unincorporated association, petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

OPINION BELOW

The judgment of dismissal of the petition for review filed by the Northern Plains Resource Council, Tongue River Agriculture Protection Association, Rosebud Protective Association, and Tri-County Ranchers Association, Ninth Circuit Court of Appeals docket number 86-7344, is an unreported decision. The Ninth Circuit Court of Appeals dismissed the Petition for Review filed by the Petitioners, concluding that the Petitioners lacked standing to contest the Interstate Commerce Commission's approval of the Tongue River Railroad Company's applications for authority to construct a railroad and to issue securities to finance construction. Petitioners sought judicial review of the Commission's decision pursuant to Title 28, United States Code, §§2321 and 2342. The unpublished opinion of the Ninth Circuit Court of Appeals is dated May 12, 1987 (App. A., infra, 1a-4a). The Court of Appeals denied the Petition for Rehearing on June 11, 1987 (App. B, infra, 1b).

JURISDICTION OF THIS COURT

This Court's jurisdiction to review the decision of the Ninth Circuit Court of Appeals in this matter is

conferred by 28 U.S.C. §1254(1).

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STATUTORY PROVISIONS INVOLVED

The texts of the following statutory provisions relevant to the determination of the present case are set forth in the Appendix (App. C, infra, 1c-9c).

Generally, the Mineral Lands Leasing Act, 30 U.S.C. §202, provides that no common carrier railroad shall hold a federal lease for coal deposits except for its own railroad purposes (App. C, infra, 1c).

Generally, the Transporation Act, 49 U.S.C. §10901, requires the approval of the Interstate Commerce Commission before the construction of a rail line (App. C, infra, 2c-4c); additionally, the Transportation Act, at 49 U.S.C. §11301, requires the approval of the Interstate Commerce Commission before a regulated carrier may issue securities (App C, infra, 5c-9c). The construction of a railroad line can be approved by the Interstate Commerce Commission only upon its finding that the public convenience and necessity will be served. 49 U.S.C. §10901(c)(1). Securities may be issued only if the Interstate Commerce Commission finds that the issuance of the securities: (i) is for a lawful object; (ii) is

compatible with the public interest; (iii) is appropriate for or consistent with proper performance by the carrier; and (iv) will not impair the financial ability of the carrier to provide service. 49 U.S.C. §11301(d)(1).

STATEMENT OF THE CASE

In 1983, the Tongue River Railroad Company applied for authority from the Interstate Commerce Commission to construct an eighty-nine mile common carrier railroad with termini at Miles City, Montana and Ashland, Montana. In 1984, the Tongue River Railroad Company applied for authority from the Interstate Commerce Commission to issue securities to finance construction of the railroad. Hearings were held on both applications in January, 1985. In May, 1986, the Interstate Commerce Commission entered its decision approving both applications.

The Northern Plains Resource Council, Tongue River Agriculture Protection Association, Rosebud Protective Association, and Tri-County Ranchers Association (hereinafter collectively referred to as "Petitioners" or "NPRC") opposed both applications on environmental grounds and upon the ground that the Interstate Commerce Commission's approval of the applications would give rise to a violation of §2(c) of the

Mineral Lands Leasing Act, 30 U.S.C. §202.[1] NPRC attempted to obtain judicial review of the Interstate Commerce Commission decision in the Ninth Circuit Court of Appeals. Northern Plains Resource Council, et al., v. United States of America, et al., Ninth Circuit Court of Appeals (No. 86-7344). On May 12, 1987, the Court of Appeals dismissed NPRC's petition for review ruling that NPRC lacked standing to seek review of the agency action (App. A, infra, 1a-4a). NPRC's petition for rehearing was denied on June 11, 1987 (App. B, infra, 1b).

HISTORY OF THE CASE

Members of the petitioning organizations include landowners whose property will be crossed by the Tongue River Railroad Company right-of-way. These landowners are opposed, on several grounds, to the agency decision which authorizes both the construction of the railroad and the issuance of securities to finance that construction.

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1. Section 2(c) of the Mineral Lands Leasing Act, (App. C, infra 1c), generally prohibits the sale of a federal coal lease to a common carrier railroad. One of the Tongue River Railroad Company's general partners is affiliated with the owner of a federal coal lease.

First, these landowners object to the environmental damage that will result from the construction and operation of the railroad.[2] Second, the landowners opposed the railroad on the ground that one of the Tongue River Railroad Company's general partners, Transportation Properties, Inc., is affiliated with Thermal Energy, Inc., the owner of federal coal lease M-54714.[3] NPRC argued that since §2(c) of the Mineral Lands Leasing Act precluded the sale of a federal coal lease to a common carrier railroad, the Interstate Commerce Commission could not authorize the construction and operation of a railroad which was controlled by an entity already owning a federal coal lease.

The Interstate Commerce Commission, on May 1, 1986, authorized the sale of securities and construction of the railroad and found that, while it must consider §2(c) in

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2. NPRC did not pursue the environmental objections in its Petition for Review presented to the Ninth Circuit.

3. The propriety of the sale of federal coal lease M-54714 has been challenged by the Northern Cheyenne Tribe in Northern Cheyenne Tribe v. Hodel, Ninth Circuit Court of Appeals (No. 86-4403). United States District Judge James F. Battin suspended coal lease M-54714 in Northern Cheyenne Tribe v. Hodel, U.S. District Court, District of Montana (No. CV-82-116-BLG).

rendering its decision, a violation of §2(c) would occur only when the railroad began operations. The Commission therefore concluded that it should presently authorize construction of the railroad but would withhold operating authority from the railroad pending a determination by the agency charged with enforcing §2(c), the Department of Interior, whether a §2(c) violation exists.

NPRC petitioned the Ninth Circuit Court of Appeals for review of the Interstate Commerce Commissioner's decision. After briefs were filed, the Circuit Court of Appeals dismissed the appeal on the ground that NPRC lacked standing to raise a challenge based upon §2(c). In so ruling, the Court of Appeals held that only competitors of the railroad or coal owners or operators have standing to raise challenges pursuant to §2(c) (App. A, infra, 4a). Because NPRC did not fall within the "zone of interests" of §2(c) as defined by the Ninth Circuit, the appellate court concluded that NPRC lacked standing. Id.

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WHY THE WRIT SHOULD BE GRANTED

A. SUMMARY OF ARGEMENT.

This petition presents a case whereby the Ninth Circuit Court of Appeals has decided a federal question,

relating to the standing of an aggrieved party to challenge federal agency action, in a manner in conflict with the applicable decisions of this Court. The Ninth Circuit Court of Appeals has, through its dismissal of the proceedings before it, reduced the class of people who are permitted to protest administrative action, contrary to the trend enunciated by this Court in its decisions which enlarges that class. See Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S. Ct. 827, 25 L.Ed.2d 184 (1970).

B. THE RULING THAT AFFECTED LANDOWNERS LACK STANDING TO PROTEST THE AUTHORIZATION TO CONSTRUCT A RAILROAD AND THE AUTHORIZATION TO ISSUE SECURITIES TO FINANCE CONSTRUCTION IS CONTRARY TO THE DECISIONS OF THIS COURT OTHERWISE ENLARGING THE CLASS OF PEOPLE WHO MAY PROTEST FEDERAL ADMINISTRATIVE ACTION.

This Court should grant the Writ of Certiorari because the decision of the Ninth Circuit Court of Appeals dismissing NPRC's Petition for Review on standing grounds is in direct conflict with applicable decisions of this Court. See Clarke v. Security Industries Ass'n, 479 U.S. ____, 107 S.Ct. 750, 93 L. Ed.2d 757 (1987); Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. ____, 106 S.Ct. 2860, 92 L. Ed.2d 166, (1986); Block v.

Community Nutrition Institute, 467 U.S. 340, 104 S.Ct. 2450, 81 L. Ed.2d 270 (1984); and Association of Data Processing Service Organizations, Inc. v. Camp, supra, 397 U.S. 150, 90 S.Ct. 827.

The Ninth Circuit Court of Appeals ruled that Petitioners have no standing to challenge the action of the Interstate Commerce Commission (herinafter referred to as "ICC" or the Commission) on the basis of §2(c) of the Mineral Lands Leasing Act because Petitioners are not "interested parties" (App. A, infra, 4a). The Ninth Circuit reasoned that, absent an affiliation to the coal industry or an allegation of unfair competition, Petitioners could not be heard to complain about a violation of §2(c) that would occur as a result of the ICC's certification that the Tongue River Railroad is in the public convenience and necessity. The Ninth Circuit recognized that the Petitioners were adversely affected or aggrieved by the ICC decision, but ruled, in dismissing the Petition for Review, that Petitioners' injuries did not fall within the zone of interests to be protected or regulated by §2(c). The Circuit Court did not consider Petitioners' challenge in the context of the Transportation Act, 49 U.S.C. §10901 and 49 U.S.C. §11103.

Petitioners sought review of the ICC certification on the basis that, through certification of the railroad, the Interstate Commerce Commission had countenanced a

controversion of the requirements of §2(c) of the Mineral Lands Leasing Act and had permitted the Tongue River Railroad Company to achieve indirectly that which it could not achieve directly, i.e., the ownership of a federal coal lease by a common carrier railroad. Petitioners argued that such a situation was inconsistent with the "public interest" mandate implicit in the Transporation Act, 49 U.S.C. §10901, and contrary to the requirement that any proposed issuance of securities by a common carrier railroad be only for a "lawful object." 49 U.S.C. §11301. The Circuit Court of Appeals ignored Petitioners' arguments which were based upon the Transportation Act and instead simply concluded that Petitioners could not even raise any questions concerning §2(c) of the Mineral Lands Leasing Act because Petitioners were not coal producers or transportation parties.

The Circuit Court of Appeals decision is contrary to and offensive to the "trend . . . toward enlargement of the class of people who may protest administrative action." See Association of Data Processing Service Organizations, Inc., supra, 397 U.S., at 154, 90 S.Ct., at 830.

A party has standing to challenge administrative action if that party can demonstrate that he is adversely affected or aggrieved by the action and that the interest which he seeks to protect is "arguably within the zone of

interests to be protected or regulated by the statute or constitutional guarantee in question." See Association of Data Processing Service Organizations, Inc., supra, 397 U.S., at 153, 90 S.Ct., at 829. The "zone of interest" formula elucidated in Data Processing requires broad interpretation of the phrase "a relevant statute." Clarke v. Securities Industry Ass'n, supra, 479 U.S., at ____, 107 S.Ct., at 756. The "zone of interest" formula also incorporates the "trend" toward the enlargement of the class of people who may protest administrative action. Id. Judicial review of agency action, under this formula, is presumptively available. See Block v. Community Nutrition Institute, supra, 467 U.S., at 348, 104 S. Ct., at 245; Clarke v. Securities Industry Ass'n, supra, 479 U.S., at _____, 107 S.Ct., at 757. This presumption can be overcome, however, only where the congressional intent to preclude judicial review is "fairly discernable in the statutory scheme." Block v. Community Nutrition Institute, supra, 467 U.S., at 351, 104 S.Ct., at 2457; Clarke v. Securities Industy Ass'n, supra, 479 U.S., at ___, 107 S.Ct., at 757. The essential inquiry to be made is whether Congress "intended [for a particular] class [of Plaintiffs] to be relied upon to challenge agency disregard of the law." Block v. Community Nutrition Institue, supra, 467 U.S., at 347, 104 S. Ct., at 2455. The "zone of interest" test is a guide for deciding whether, in view of Congress' evident intent to make agency actions

presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency action. Block v. Community Nutrition Institute, supra, 467 U.S., at 351, 104 S.Ct., at 2457; Clarke v. Securities Industry Ass'n, supra, 479 U.S., at ___, 107 S.Ct., at 757.

When the party contesting the agency action is not itself the subject of the contested regulatory action, this Court's standing opinions denies a right of review to the challenger only when the challenger's interests "are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Clarke v. Securities Industry Ass'n, supra, 479 U.S., at _____, 107 S.Ct., at 757. This test is "not meant to be especially demanding; in particular, there need be no indication of

congressional purpose to benefit the would-be plaintiff." Id. [4]

The Ninth Circuit Court of Appeals dismissed the Petition for Review because "§2(c) of the Mineral Lands Leasing Act was enacted for the protection and benefit of competing coal interests from unfair competition." See Order at 2 (App. A, infra, 2a). The Court concluded that, since the Petitioners are not in the coal business or involved in the production or distribution of energy of any sort, they were not within the zone of interests protected by §2(c) of the Mineral Lands Leasing Act. Id. The Ninth Circuit disregarded this Court's rulings relating to standing by erecting this hurdle for Petitioners to overcome.

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4. Clarke v. Securities Industry Ass'n was decided by this Court on January 14, 1987. NPRC's Petition for Review was submitted to the Ninth Circuit Court of Appeals on April 8, 1987, and the Circuit Court's decision dismissing the appeal was filed on May 12, 1987. When this Court decided the Clarke case and provided its statement of the zone of interest test "as now formulated," Clarke, supra, 479 U.S., at n. 15, 107 S.Ct., at 757 n. 15, it was giving guidance to the judiciary concerning the issue of standing. Petitioners submit that the Ninth Circuit Court of Appeals expressly disregarded this Court's recent pronouncements on standing by simply concluding that since Petitioners are not coal producers, they cannot be heard to complain about the action of the Interstate Commerce Commission in this case.

Petitioners are not required to show any "indication of congressional purpose to benefit" them to have standing, as required by the Ninth Circuit. Clarke, supra, 479 U.S., at _____, 107 S.Ct., at 757. Rather, Petitioners are presumptively entitled to judicial review of the ICC's decision and need not point to any "separate indication of congressional intent to make agency action reviewable; instead, the rule is that the cause of action for review of such action is available 'absent some clear and convincing evidence of legislative intention to preclude review'." See Japan Whaling Ass'n v. American Cetacean Soc., supra 478 U.S., at _____, 106 S.Ct., at 2866; Block v. Community Nutrition Institute, supra, 467 U.S., at 345, 104 S.Ct., at 2455.

The Ninth Circuit Court of Appeals has incorrectly equated the position of the Petitioners in this action with the position of the consumers in Block v. Community Nutrition Institute, supra, 467 U.S. 340, 104 S.Ct. 2450. That case involved the statutory scheme relating to milk price orders, which this Court described as "a cooperative venture among the Secretary [of Agriculture], producers, and handlers" of milk products. This Court reviewed the purpose of this statutory scheme and the methods designed by Congress to achieve that purpose and concluded "that consumer participation is not provided for under the complex scheme enacted by Congress." Block v. Community Nutrition Institue, supra, 467 U.S., at 351, 104

S.Ct., at 2457. In Block, this Court concluded that consumer suits would have undermined the congressional preference for administrative remedies and would have disrupted administration of the congressional scheme. In the context of that case, this Court concluded that Congress intended to preclude the judicial review sought by the petitioners because its intent to preclude that review was "fairly discernable" in that statutory scheme. In different situtations, however, "where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of adminstrative action is controlling." Block, supra, 467 U.S., at 351, 104 S.Ct., at 2457.

The Ninth Circuit's simplistic and unsophisticated analysis of standing in this case leaves Petitioners with no forum in which to litigate their injuries. Petitioners are landowners whose property will be irrevocably affected by construction of the railroad. Petitioners' ranching operations will be irrecovably altered and their interests in the quiet enjoyment of their property rights will be irrevocably altered. These consquences result directly from the action of the Interstate Commerce Commission which allows the Tongue River Railroad to construct its railroad. In L. Singer & Sons v. Union Pacific Railroad, 311 U.S. 295, 61 S.Ct. 261, 85 L.Ed. 198 (1940), Court ruled that a complainant challenging ICC action must, to

establish "standing", assert something more than a common concern for obedience to the law. According to Singer, a challenger has "standing" if it is possessed of a definite legal right that is seriously threatened by agency action. Id., 311 U.S., at 304, 61 S.Ct., at 258; accord, Concord Township v. U.S., 625 F.2d 1068 (3rd Cir. 1980). Petitioners submit that injury to their interests as affected landowners constitute injury in fact within the zone of interests to be protected by the Transporation Act, 49 U.S.C. §10901 and 49 U.S.C. §11301, and the Mineral Lands Leasing Act, 30 U.S.C. §202.

Nothing in the Transportation Act reveals a "fairly discernable" congressional intent to preclude the judicial review that Petitioners here seek. See Block, supra, 467 U.S., at 351, 104 S.Ct., at 2456. Indeed, the Transporation Act contemplates that shippers, carriers and all those parties directly affected by a proposed transporation scheme have interests that are subject to judicial review within the context of that statutory scheme. Petitioners in the case at bar are directly affected by the transportation scheme sought to be established by the Tongue River Railroad Company. Petitioners' arguments that the Interstate Commerce Commission decision granting a certificate of public convenience and necessity to the railroad is unlawful should be heard because nothing in the Transporation Act evidences a congressional intent,

fairly discernable, to preclude that review, and moreover, with respect to standing under §2(c), because there "need be no indication of congressional purpose to benefit the" Petitioners. See Clarke v. Securities Industry Ass'n, supra, 479 U.S., at ___; 107 S.Ct., at 757.[5]

The Ninth Circuit Court of Appeals has disregarded the generous and liberal standing decisions of this Court and has held Petitioners to an inappropriately onerous threshold standing requirement. The reported opinions of this Court clearly demonstrate that Petitioners have standing to seek judicial review of the decision of the Interstate Commerce Commission; the Ninth Circuit Court of Appeals had disregarded these rulings.

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5. This Court's decisions relating to standing reflects its concern that the protesting party be "a reliable private attorney general to litigate the issues of the public interest . . ." Association of Data Processing, supra, 397 U.S., at 154, 90 S.Ct., at 830; Clarke v. Securities Industry Ass'n, supra, 479 U.S., at _____, 107 S.Ct., at 756 n.12. Here, NPRC is a reliable private attorney general having exclusively challenged the certification before the Commission. If NPRC is denied standing, there will be no review of the lawfulness of the challenged agency action.

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CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals should be granted.

Respectfully Submitted

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHERN PLAINS RESOURCE COUNCIL, a Montana non-profit corporation; TONGUE RIVER AGRICULTURE PROTECTION ASSOCIATION, an unincorporated association; ROSEBUD PROTECTIVE ASSOCIATION, an unincorporated association; TRI-COUNTY RANCHERS ASSOCIATION, an unincorporated association, Petitioners. -v- INTERSTATE COMMERCE COMMISSION, Respondent, THE TONGUE RIVER RAILROAD COMPANY, Intervenor, UNITED STATES OF AMERICA, Respondent.	)	No. 86-7344 ICC No. 30186 MEMORANDUM

Petition to Review a Decision of the Interstate Commerce Commission

Submitted ** April 8, 1987
Seattle, Washington

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** The panel finds this case appropriate for submission without oral argument pursuant to 9th Cir. R. 3(f) and Fed. R. App. P. 34(a).

Before: BROWNING, WRIGHT, and HALL, Circuit Judges.

Northern Plains Resource Council (NPRC) appeals the Interstate Commerce Commission's (ICC) May 9, 1986 decision granting a certificate of public convenience and necessity to the Tongue River Railroad Company (TRRC) to construct and finance a 89-mile common carrier railroad pursuant to 49 U.S.C. §§10901 and 11301. The sole issue challenged by the NPRC on appeal is whether the ICC's decision violates section 2(c) of the Mineral Lands Leasing Act, 30 U.S.C. §202. We dismiss the appeal because the appellants lack standing to sue under section 2(c).

STANDING

The TRRC, the intervening appellee, argues that

section 2(c) of the Mineral Lands Leasing Act was enacted for the protection and benefit of competing coal interests from unfair competition. It also argues that, since the appellants are not in the coal business or involved in the production or distribution of energy of any sort, their interests are not within the "zone of interests" protected by section 2(c). We agree.

To have standing to obtain judicial review of a challenged agency action, a plaintiff must establish that it has suffered an injury in fact and that its interests are arguably within the zone of interests to be protected or regulated by the statute that the plaintiff claims the agency violated. See 5 U.S.C. §702; Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

The zone of interests protected by section 2(c) is limited. Concerns over railroad monopolization of the coal industry led to the passage of section 2(c). Northern Indiana Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 271-72 (7th Cir. 1986). It was enacted because of a concern that, if railroads were allowed to own coal mines, they would discriminate in their rates for transportation against competing coal mines which depend on rail transportation. Id. Section 2(c)'s legislative history reveals that Congress intended the section 2(c) prohibition

to protect independent coal companies from unfair competition. See 58 Cong. Rec. 4739 (1919) (remarks of Sen. LaFollette).

The appellants are Northern Plains Resource Council, Tongue River Agriculture Protection Association, Rosebud Protection Association, and Tri-County Ranchers Association. They are landowners arguably affected by the ICC's decision. None of the appellants compete with the TRRC. Their only claim on appeal is the alleged section 2(c) violation. While competitors of the TRRC or someone in the coal business may have standing to complain of a section 2(c) violation, see National Coal Ass'n v. Hodel, 617 F. Supp. 584, 588 (D.D.C. 1985), the appellants here are not "within the zone of interests protected" by section 2(c). Cf. Block v. Community Nutrition Institute, 467 U.S. 340, 348 (1984) (while milk handlers have the right to seek judicial review of pricing orders issued by the Secretary of Agriculture under the Agricultural Markerting Agreement Act of 1937, consumers have no such right).

APPEAL DISMISSED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHERN PLAINS RESOURCE COUNCIL, a Montana non-profit corporation; TONGUE RIVER AGRICULTURE PROTECTION ASSOCIATION, an unincorporated association; ROSEBUD PROTECTIVE ASSOCIATION, an unincorporated association; TRI-COUNTY RANCHERS ASSOCIATION, an unincorporated association,	)	No. 86-7344
	)	ICC No. 30186
	)	ORDER
Petitioners.	)	
-v-	)	
INTERSTATE COMMERCE COMMISSION,	)	
Respondent,	)	
THE TONGUE RIVER RAILROAD COMPANY,	)	
Intervenor,	)	
UNITED STATES OF AMERICA,	)	
Respondent.	)	

Beore: BROWNING, WRIGHT, and HALL, Circuit Judges:

The petition for rehearing is denied.

APPENDIX C

30 U.S.C. §202

§202. Common carriers; limitations of lease or permit

No company or corporation operating a common-carrier railroad shall be given or hold a permit or lease under the provisions of this Act for any coal deposits except for its own use for railroad purposes; and such limitations of use shall be expressed in all permits and leases issued to such companies or corporations; and no such company or corporation shall receive or hold under permit or lease more than ten thousand two hundred and forty acres in the aggregate nor more than one permit or lease for each two hundred miles of its railroad lines served or to be served from such coal deposits exclusive of spurs or switches and exclusive of branch lines built to connect the leased coal with the railroad, and also exclusive of parts of the railroad operated mainly by power produced otherwise than by steam.

Nothing in this section [30 USCS §§ 201, 202, 202a] shall preclude such a railroad of less than two hundred miles in length from securing one permit or lease thereunder but no railroad shall hold a permit or lease for lands in any State in which it does not operate main or branch lines.

49 U.S.C. §10901

§10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the judrisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.] may - -

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line; only if the Commission finds that the present or future public convenience and necessity require or will be enhanced by the construction or acquisition (or both) and operation of the railroad line.

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Commission shall - -

(1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;

(2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;

(3) have a copy of the summary published in the Federal Register;

(4) take other reasonable and effective steps to publicize the application; and

(5) indicate in each transmission and publication that each interested person is entitled to recommend to the Commission that it approve, deny, or take other action concerncing the application.

(c)(1) If the Commission —

(A) finds public convenience and necessity, it may - -

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions the

Commission finds necessary in the public interest; or

(B) fails to find public convenience and necessity, it may deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the construction or acquisition (or both) and operation approved by the Commission.

49 U.S.C. §11301

§11301. Authority of certain carriers to issue securities and assume obligations and liabilities.

(a) In this section –

(1) "carrier" means a rail or sleeping car carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title [49 USCS §§10501 et seq.] (except a street, suburban, or interurban electric railway not operated as a part of a general railroad system of transportation), and a corporation organized to provide transportation by rail carrier subject to that subchapter. [49 USCS §§10501 et seq.]

(2) "security" means a share of capital stock, a bond, or other evidence of interest in, or indebtedness of, a carrier.

(b)(1) Subject to subchapter I of chapter 2A, chapter 2B, and subchapter I of chapter 2D of title 15 [15 USCS §§ 77a et seq., 78a et seq.. 80a-1 et. seq.], the Commission has exclusive jurisdiction to approve the issuance of securities by a carrier and the assumption of an obligation or liability related to the securities of another person by a carrier. A

carrier may not issue securities or assume those obligations or liabilities without the approval of the Commission. No other approval is required. A security issued or obligation or liability assumed by a carrier in violation of this subsection or in violation of a condition prescribed by the Commission under subsection (d) of this section is void. However, a security or obligation issued or assumed under authority of this section is not void for failure to comply with a procedural requirement of this section or other matter preceding entry of the order of the Commission.

(2) Paragraph (1) of this subsection does not apply to notes issued by a carrier if the notes mature not more than 2 years after their date of issue and total (with all then outstanding notes having a maturity of not more than 2 years) not more than 5 percent of the par value of the then outstanding securities of that carrier. If the securities do not have a par value, the par value of those securities is the fair market value on the date of issue. Paragraph (1) of this subsection applies to a subsequent funding of notes referred to in this paragraph.

(c)(1) A carrier issuing notes referred to in subsection (b)(2) of this section shall file a certificate of notification with the Commission by the end of the 10th day after they are

issued. That notification must include substantially the same matter required by the Commission for an application for authority to issue other securities.

(2) A carrier that pledges, repledges, or otherwise disposes of a security referred to in an application for authority or a certificate of notificiation under this section as pledged or held unencumbered in the treasury of that carrier shall file a cerificate of notificiation with the Commission by the end of the 10th day after it disposes of the security.

(d)(1) The Commission may begin a proceeding under this section on application of a carrier. Before taking final action, the Commission must investigate the purpose and use of the securities issue or assumption and the proceeds from it. The Commission may approve any part of the application and may require the carrier to comply with appropriate conditions. After an application is approved under this section, the Commission may change a condition previously imposed or use that may be made of the securities or proceeds for good cause shown subject to the requirements of this section. The Commission may approve an application under this section only when it finds that the securities issue or assumption - -

(A) is for a lawful object within the corporate purpose of the carrier and reasonably appropriate for that purpose;

(B) is compatible with the public interest;

(C) is appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier; and

(D) will not impair the financial ability of the carrier to provide the service.

(2) An application or certificate must be made under oath and signed and filed for the carrier by a designated executive officer who knows the matters stated in the application or certificate. On receipt of an application of a carrier under this section, the Commission shall have a copy of the application served on the chief executive officer of each State in which that carrier operates. The appropriate authorities of those States are entitled to be admitted as parties to a proceeding under this section to represent the rights and interests of their people and States.

(e) The Commission shall require a carrier that issues securities, including notes, under this section to submit reports to it. The reports must identify the disposition of those securities and the application of the proceeds from their disposition.

(f) This section does not imply a guaranty or obligation of those securities by the United States Government. This section does not apply to securities issued or obligations or liabilities assumed by the United States Government, a State, or an instrumentality or political subdivision of one of them.

Supreme Court, U.S.
FILED
SEP 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-415
No. _____

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

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NORTHERN PLAINS RESOURCE COUNCIL; TONGUE RIVER AGRICULTURE PROTECTION ASSOCIATION; ROSEBUD PROTECTIVE ASSOCIATION; and TRI-COUNTY RANCHERS ASSOCIATION,

Petitioners,

-vs-

THE UNITED STATES OF AMERICA; the INTERSTATE COMMERCE COMMISSION; and the TONGUE RIVER RAILROAD COMPANY,

Respondents.

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SUPPLEMENTAL APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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APPENDIX D

INTERSTATE COMMERCE COMMISSION

CERTIFICATE AND DECISION

Finance Docket No. 30186

TONGUE RIVER RAILROAD COMPANY - RAIL CONSTRUCTION AND OPERATION - IN CUSTER, POWDER RIVER AND ROSEBUD COUNTIES, MT

Finance Docket No. 30186 (Sub-No. 1)

TONGUE RIVER RAILROAD COMPANY - ISSUANCE OF SECURITIES

Decided: May 1, 1986

In Finance Docket No. 30186, the Tongue River Railroad Company (TRRC) seeks authority under 49 U.S.C. 10901 to construct and operate an 89-mile rail line from two points south of Ashland, MT to a point near Miles City, MT. The proposed line will serve future coal mines in the Ashland area and will connect with the Burlington Northern Railroad Company (BN) near Miles City. In Finance Docket No. 30186 (Sub-No 1), TRRC also seeks authority under 49 U.S.C. 11301 to issue approximately $175 million in securities to finance the proposed

construction. The applications are opposed by the Northern Plains Resource Council, Tongue River Agriculture Protection Association, Rosebud Protective Association, and Tri-County Ranchers Association (collectively referred to as "NPRC").

In an initial decision served September 4, 1985, the Administrative Law Judge (ALJ) approved both applications, but subjected the construction and operation of the line to conditions intended to mitigate the environmental impacts of the proposed construction. (For the conditions, see Appendix B of the Initial Decision.) The appeals of TRRC and NPRC raise only one issue: the effect that section 2(c) of the Mineral Lands Leasing Act of 1920, 30 U.S.C. 202 (Leasing Act) should have on our consideration of these applications.

BACKGROUND

1. Purpose of the Proposal. TRRC, a limited partnership, was formed in 1981 to provide rail service to future coal mines in the Tongue River Valley of

southeastern Montana. While it is estimated that over 10 billion tons of mineable low-sulfur coal are in reserve in this area, no rail line serves the potential mine sites, the highways are inadequate for truck movements of coal, and other alternatives such as mine-mouth generation and coal slurry pipelines are not considered feasible. The coal reserve holders have been unable to develop their mines because utilities have been reluctant to enter contracts with the holders without the assurance of adequate transportation. BN declined to construct a line because coal reserve holders had not obtained firm coal contracts from utilities.

2. Proposed Route. The proposed route of the 89-mile line will follow the Tongue River Valley between Miles City and two points south of Ashland. The line will connect with BN at Miles City. Two options have been proposed for that connection. One would connect TRRC and BN through rail yards abandoned by the former Chicago, Milwaukee, St. Paul and Pacific Railroad

Company (MILW). The second option (the so-called BN option) would connect TRRC and BN at Branum Lake near the Miles City Fish Hatchery, owned by the Montana Department of Fish, Wildlife and Parks.

From Miles City, the line will proceed south along the west side of the Tongue River, crossing the United States Department of Agriculture Livestock and Range Research Station (LARRS). Ten miles north of Ashland, the line will cross the river and continue south. Near Ashland, the line will split into two branches. One branch will continue south along Otter Creek and terminate 7.7 miles south of Ashland. The other branch will follow one of two alignments in or around Ashland, continue southwest and terminate at the Montco Mine (Montco) 8.9 miles south of Ashland. These two alignments are: (1) the Ashland southeastern alignment, which would route the line along the eastern edge of Ashland and continue between Otter Creek and the Tongue River to Montco; and (2) the Ashland northeastern alignment, which would route

the line through Ashland along the Tongue River and terminate at Montco.

3. Structure of TRRC. As section 2(c) involves, as discussed infra, a company or corporation operating a common carrier railroad while holding a Federal coal lease, the structure and composition of TRRC is critical. Therefore, the facts pertaining to TRRC and its component entities and their affiliates are restated here.[1]

TRRC consists of three general partners: Transportation Properties (TP), and D.S. Cartage (DS), each holding 42.075 percent, and Otter Creek Transportation Company (Otter Creek), holding 14.850 percent, and a limited partner, Tongue River Holdings, Inc. (TRH), holding 1.00 percent. TRH is a nominal entity owned proportionally by the general partners, and was organized as a vehicle to be used in the event any of TRRC's general partners changes its interest to become a

1. See organization chart of TRRC in Appendix A.

limited partner.

TP is a partnership composed of WesRail, Ltd. and ThermRail, Inc. WesRail, Ltd., in turn, is a limited partnership composed of Wesco Transportation, Inc. (Wesco Trans) and Bellford & Company (Bellford). Wesco Trans is a wholly-owned subsidiary of Wesco Resources, Inc. (Wesco). Bellford provides financing for Wesco and holds limited partnerships in its ventures. ThermRail, Inc. is a wholly-owned subsidiary of Washington Energy Company (Washington).

DS is a wholly-owned subsidiary of Diamond Shamrock Coal Company (DS Coal), which is a wholly-owned subsidiary of Diamond Shamrock Corporation (DS Corp). Otter Creek is a wholly-owned subsidiary of Consol Transportation Company (CTC). CTC is itself a wholly-owned subsidiary of Consolidated Coal Sales Company (Consol), whose parent, Conoco, Inc., is owned by E.I. du Pont de Nemours and Company (DuPont).

TRRC will be managed by a committee of three

members, composed of one representative from each general partner. Voting is weighed to reflect the interest of each general partner, with decisions made by a majority of interests. Under the partnership agreement, the committee will have sole responsibility for managing TRRC through all phases of construction and operation. It is proposed that there will be no direct connection with any coal mining operation of any partner's affiliates. The agreement also provides that the management committee may delegate functions to a managing agent.

The proposed construction is in three phases and is currently in Phase I, which involves ordering design and engineering studies, obtaining necessary permits and certificates for construction and operation, negotiating mitigating conditions, and arranging preliminary financing. The management committee has delegated responsibility to carry out Phase I of the project to Wesco Trans.

Phase II involves all functions relating to construction, such as purchasing right-of-way, obtaining

materials and equipment, and securing bids from contractors. Phase III involves obtaining long-term financing, completing construction, purchasing equipment, and commencing operations. At this point, no decisions have been made whether Wesco Trans would be delegated functions in Phases II and III, or whether it would have any management responsibilities for operations of TRRC.

4. Coal Ownership. Each of the general partners in TRRC is affiliated with coal interests.[2]

TP is related to several companies holding coal interests. Wesco and Bellford are partners in Wesbel, Ltd. Washington's subsidiary, Thermal Energy, Inc. (Thermal) and Wesbel, Ltd., are partners in ThermWest which, in turn, is in partnership with Tongue River Resources (TRR) in Cook Mountain Partnership (Cook Mt). TRR is a wholly-owned subsidiary of DS Coal. Cook Mt was organized to develop coal reserves located north of

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2. See chart in Appendix B.

Ashland.

Thermal also obtained Federal coal lease M-54714 in April 1982. The lease is located in the Cook Mountain area, but is not part of Cook Mt. Wesco successfully bid on a Federal coal lease adjoining the Thermal lease. Wesco's lease has not been issued because it has not obtained surface rights. Thermal and Wesco propose to develop their holdings jointly and use TRRC to transport coal.[3]

The Thermal and Wesco leases are also involved in two court suits against the Department of Interior (DOI) challenging all Federal coal leases in Montana. In Northern Cheyenne Tribe v. Hodel, CV. 82-116-BLG (D. Mont. 1982), Federal coal leases are alleged to violate the National Environmental Policy Act (NEPA), the Federal

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3. The section of land covered by a Federal coal lease is considered too small to be efficiently and economically developed as a mine. This is why Thermal proposes to develop its Federal lease in conjunction with Wesco.

Coal Leasing Amendments of 1976, and the Federal trust responsibility to the Northern Cheyenne Tribe. The second suit, National Wildlife Federation v. Burford, CV. 82-117-BLG (D. Mont. 1982), alleges that DOI did not derive fair market value for the leases.

Thermal and DS Coal are also partners in the Montco mine, being developed on private reserves southwest of Ashland. Montco is the only mine site in the Tongue River Valley that Montana has granted a permit to and that can therefore start a mining operation. The mine is presently under construction and expects to use TRRC to transport coal.

Consol holds coal interests in private lands in Otter Creek. It supports TRRC's application because its coal interests can be developed only if a viable rail transportation system exists. It expects that TRRC will give it essential rail service. Consol also holds Federal coal lease No. M-46292 in Big Horn County. TRRC will not serve Consol's Federal leasehold.

TRRC's application is also supported by other coal interests in the Tongue River Valley. Meridian Land and Mineral Company (Meridian), a subsidiary of Burlington Northern, Inc., is one of the largest coal owners in the valley, and has leased reserves to Consol, Montco, and others. In its view, the rail line to be built by TRRC will facilitate the development of coal interests.

Cities Service Oil and Gas Corporation has reserves at Otter Creek and leases reserves from Meridian. It supports the appication, believing that TRRC will provide it with essential rail service.

TXO Minerals, Inc. holds substantial rights to Federal and State coal interests in the Tongue River Valley. It supports the application to enhance the marketing of Tongue River Valley coal.

5. Need for Rail Service. The initial decision details the evidence submitted by TRRC and prospective shippers to show a need for rail service to the Tongue River Valley. Potential coal mine operators in the Tongue

River Valley are seeking markets for sales to utilities in the Upper Midwest and Pacific Northwest. However, it appears that utilities will not commit to coal purchases from Tongue River Valley mines without a rail system to the mines. With the reluctance of BN to provide rail service, mine operators have taken the initiative to develop rail service.

Coal reserves in the Tongue River Valley are estimated at 10 billion tons, of which approximately 3.5 billion tons are realistically exploitable. TRRC estimates that it would be able to haul between 40 to 50 million tons per year, or 12 unit trains per day.

Market surveys conducted by TRRC indicate that there will be a future need for coal to generate electricity. Utilities that presently have excess generator capacity will need to supply additional electricity by the early 1990's. Tongue River coal mines would be able to compete to supply the additional coal requirements.

Protestants disputed the market studies and claimed

that there is excess mining capability in the Powder River Basin that will satisfy the needs of additional coal generation. However, the record here shows that excess capacity exits only in the Lower Powder River Basin, which supplies markets in the East and Southeast. The primary market for Tongue River Valley coal would be in the Midwest and Pacific Northwest.

6. Financial Plan and Viability. TRRC projects its initial capitalization for construction and operation at $227 million. Under its financing plan, the general partners will make an equity contribution totalling $52 million. The remaining $175 million would be financed by long-term debt. Securities evidencing the debt are the subject of the directly-related application in Finance Docket No. 30186 (Sub-No. 1), filed under 49 U.S.C. 11301 for authorization to issue notes.

The financing plan provides for issuance of two classes of notes. In the first class, three short-term notes totalling $175 million would be issued for interim financing

during the 3-year period for construction of the rail line. In the second class, three long-term notes totalling $175 million would be issued for permanent long-term debt that would replace the short-term notes.

Interim construction financing would be obtained through a commercial bank loan documented by three loan agreements for which separate promissory notes would be issued. The amounts borrowed for each loan agreement represent the proportionate share of each general partner in the TRRC venture. TP's 42.5 percent is designated as "Loan A." DS's 42.5 percent is designated as "Loan B." Otter Creek's 15 percent is designated as "Loan C." Each partner agreed to advance funds to TRRC to enable it to meet payments on each loan.

The obligations of each general partner would be guaranteed by the parent companies: TP's obligations of $74,375,000 by Washington; DS's obligation of $74,375,000 by DS Corp.; and Otter Creek's obligation of $26,250,000 by DuPont. Each loan would be secured by the partnership

interest of each general partner and a proportionate amount of TRRC's assets.

Assuming that market conditions similar to those in effect when the evidence was submitted prevail when the short-term notes would be issued, interest would be at a floating rate. Financial data submitted by TRRC assumes a 12 percent per annum rate including all commitment and agency fees. Construction of the line is assumed to take 3 years. During this period, interest will be reflected by increasing the principal amount of the outstanding amount of each loan.

The plan provides further that the short-term loans could be converted into term loans that would have a 10-year maximum maturity from the end of the construction period. On the term notes, interest would be paid quarterly.

At the end of the construction period, TRRC plans to refinance the loans in the institutional private placement market. The interim financing loans and short

term notes designated as "Loan A," "Loan B," and "Loan C" would be replaced by long-term notes designated respectively as "Series A," "Series B," and "Series C." Each long-term note would be guaranteed and secured in the same manner as the short-term note it replaced. Each long-term note would be issued under a separate indenture with one trustee acting on behalf of lenders under all indentures.

The long-term notes would be sold as separate obligations without cross-defaults to the other long-term notes. Under market conditions in effect when the evidence was submitted, the interest rate on Series A would be approximately 13.25 percent with a maturity of 30 years, Series B would be about 14.25 percent with a maturity of 15 years, and Series C would be approximately 12.75 percent with a maturity of 30 years. Interest on the long-term notes would be paid semi-annually. TRRC's financial adviser indicates that the intent is to issue the long-term notes to pension funds, insurance companies, or

other institutions.

The initial decision analyzes the evidence and financial data submitted by TRRC to support its application. Under the financial plan, fixed charge obligations would be deferred while the line is under construction and funds supplied under short-term loans. Once operations begin, the plan provides that the short-term obligations would be refinanced under long-term notes. TRRC's obligations to repay its debt would begin when operations commence. Assuming that operations begin in 1987, TRRC projects that it will operate at a net deficit from rail operations for the first 5 years of service. After 1992, it expects to operate the line at a net profit. By 1995, TRRC projects having a 16.6 percent rate of return, based on a capital outlay of $253 million, from 17.5 million tons of traffic.

TRRC's data show that, during its first five years of operation, it would not realize enough revenue to meet fixed charges. However, it proposes to use a technique of

"prepaid freight" to overcome deficit operations. Under that technique, utilities or consignees of freight would advance funds to TRRC to enable it to meet fixed charge obligations and other expenses in the first several years of operations. The advances would then be repaid by future reductions in rates or credits against freight charges. These arrangements would be negotiated as contract rates under 49 U.S.C. 10713. To assure adequate cash flow in the early years of operations, TRRC's general partners may make additional contributions or guarantees.

The initial decision also discusses TRRC's use of a 16.3-mile per ton factor in calculating estimated revenue and inclusion of mitigation costs in the financial plan.

7. Environmental Impact. This proceeding is a major Federal action subject to the reporting requirements of NEPA. An extensive analysis of the environmental impact of the construction and operation was directed by the Commission's Section of Energy and Environment (SEE), and the Final Environmental Impact Statement

(FEIS) was served August 23, 1985.

The FEIS analyzed the potential impact of the proposed rail line, reasonable alternatives to it, and impacts of those potential surface mining operations considered to be related actions, as well as the optional alignments at Miles City and Ashland. Also discussed are three other route options: (1) the Tongue River Alternative Route that would cross Pumpkin Creek and run along the east side of Tongue River and join the proposed route 10 miles north of Ashland; (2) the Moon Creek Alternate Route that would run west from Miles City along the former MILW route, follow the Yellowstone River and Moon Creek, and join the proposed route north of Ashland; and (3) the Colstrip Alternate Route that would run the line west from Ashland to Colstrip where it would join with BN. NPRC favors the Moon Creek alternative to avoid having the line run through LARRS. The Colstrip route would result in a 46.1-mile line.

The FEIS concluded that the route proposed by

TRRC and the Colstrip Alternate were feasible choices. The proposed route had adverse environmental impacts, but the adverse impacts on adjoining landowners would be protected by Montana law and measures in a Mitigation Plan. The FEIS did not select between the optional alignments at Miles City and Ashland. Adverse impacts of each optional alignment were also offset in the Mitigation Plan. The initial decision adopted and incorporated the FEIS and Mitigaton Plan.

The primary opposition to the proposals was by landowners represented by NPRC who were principally concerned about adverse environmental impacts on their ranches. The opposition evidence was analyzed by SEE in preparing the Mitigation Plan, and is also analyzed in the initial decision. The Plan sets forth specific mitigation measures to offset adverse effects on adjoining landowners.

The Plan also recognizes that some mitigation measures would be best negotiated by TRRC and affected

landowners. This is particularly true in mitigating adverse impacts at LARRS. The Plan recognizes that TRRC and LARRS will continue discussion of mitigating conditions that will be made part of the final easement agreement for the right-of-way across the facility. Also, the Ashland alignment was left to be negotiated by TRRC and interested parties.

No appeal is taken to the discussion and conclusions in the FEIS, Mitigation Plan, or to the relevant analysis and conclusions in the initial decision.

8. Section 2(c). As stated above, the only issues remaining on appeal relate to the impact of section 2(c) of the Leasing Act, which reads as follows:

> No company or corporation operating a common-carrier railroad shall be given or hold a permit or lease under the provisions of this chapter for any coal deposits except for its own use for

railroad purposes; and such limitations of use shall be expressed in all permits and leases issued to such companies or corporations; and no such company or corporation shall receive or hold under permit or lease more than ten thousand two hundred and forty acres in the aggregate nor more than one permit or lease for each two hundred miles of its railroad lines served or to be served from such coal deposits exclusive of spurs or switches and exclusive of branch lines built to connect the leased coal with the railroad, and also exclusive of parts of the railroad operated mainly by power produced otherwise than by steam.

> Nothing in this section * * * shall preclude such a railroad of less than two hundred miles in length from securing one permit or lease thereunder but no railroad shall hold a permit or lease for lands in any State in which it does not operate main or branch lines.

The scope of section 2(c) has never been judicially determined. The Antitrust Division of the Department of Justice (DOJ) in a memorandum dated April 25, 1980 offered its interpretation. There, DOJ gave a broad interpretation to the statutory term "company or corporation operating a common carrier railroad," because it believes that railroads should not be permitted to evade the prohibition in section 2(c) by doing indirectly what they cannot do directly. Therefore, DOJ concluded (Executive Summary) that: "Section 2(c) prohibits the issuance of federal coal leases to railroads, subsidiaries of railroad

companies, companies which are controlled by a company which operates a railroad, and joint ventures in which a railroad or railroad affiliate is a partner." In that memorandum, DOJ also proposed a set of standards for applying the section 2(c) prohibition, as interpreted.

Before the 1980 DOJ interpretation, DOI, the agency charged with administering section 2(c), had applied a much less restrictive standard to that section — the "alter ego" test. That test has been traditionally applied to the Commodities Clause, in 49 U.S.C. 10746, which is a more general prohibition against railroads transporting goods that they produce or own. Under it, the prohibition does not apply to an affiliated company unless it is so interrelated with the railroad that it should be considered as an alter ego of the railroad.

DOI abandoned the "alter ego" test after reviewing the DOJ's memorandum. In a memorandum dated December 6, 1982, DOI agreed (at 9, but only for prospective, and not retroactive, application) "that

railroad affiliates are not excluded from the prohibition in section 2(c)." However, it expressly declined to adopt the specific standards proposed, stating that DOJ's "guidelines" are not "the only alternate view of the scope of the prohibition." To our knowledge, the DOI has not, to date, adopted any firm standards to determine the reach of section 2(c).[4]

9. ALJ Resolution of the 2(c) Issues. The ALJ determined that the Commission has responsibility to rule on the possible violation of section 2(c) in this case. The ALJ recognized that, when issuance of a certificate of operating authority depends on the applicability of a statute administered by another agency, the Commission would normally defer to that agency for an interpretation of the statute. Here, however, both DOJ and DOI had

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4. Copies of DOJ's memorandum and DOI's memorandum were attached to NPRC's opening brief filed March 8, 1985.

considered the question when the lease to Thermal was issued and determined that, since TRRC was not a certificated railroad, section 2(c) was not violated. In addition, DOI, while agreeing to implement DOJ's interpretation of section 2(c), has decided not to disturb past leases.[5] The ALJ therefore concluded that the responsibility to rule on possible violations of section 2(c) unavoidably passes to the Commission.

Upon issuance of the certificate, TRRC will be able to obtain land through eminent domain, enter into contracts with utilities for transportation of coal, and issue securities for sale in financial markets. The ALJ consequently found that TRRC would become a common carrier railroad and be subject to section 2(c) as soon as it was issued a certificate.

The initial decision applied DOJ's interpretation of

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5. DOI memorandum, supra.

section 2(c), including its proposed standard that a 30 percent interest in a joint venture creates a rebuttable presumption of control. TP's 42.075 percent interest in TRRC was found to be presumptive control.[6] The combination of TP's presumptive control of TRRC and its affiliation with Thermal was determined to result in an integration of Federal coal lease holdings and rail transportation which would bring this transaction under section 2(c).

The initial decision concluded, however, that no violation of section 2(c) would result because the proposal falls within the exception in section 2(c) allowing a

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6. In addition, the initial decision considered that Washington and DS Coal have a community of interest in Cook Mt, located near the Federal lease issued to Thermal. Thermal, in turn, was found to have controlling interest through ThermWest in Cook Mt. DS Coal and Thermal are also partners in Montco. As a result of these affiliations and controlling interests, the ALJ inferred that Washington (through affiliates) could have more than 80 percent control of TRRC. The ALJ noted that the possible domination of TRRC by Washington is also a concern under section 2(c).

railroad of 200 miles or less to secure one Federal lease. TRRC was found to come within the exception, because only one Federal lease was imputed to it,[7] and its line will be less than 100 miles. Therefore, TRRC's applications for authority (1) under section 10901 to construct and operate the line, subject to the Mitigation Plan, and (2) under 11301 to issue securities to finance the transaction, were approved.

APPEALS

As noted above, TRRC and NPRC have both

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7. The ALJ found that only one Federal coal lease should be imputed to TRRC — the one held by Thermal. The pending lease to Wesco was not imputed because (1) it had not been issued and (2) in any event Wesco is not a controlling partner in TRRC under DOJ standards. Similarly, the Federal lease held by Consol in Big Horn County was not imputed because the DuPont interest in TRRC is not controlling (held by the ALJ decision at 26). There are no Federal leases held by the Cook Mt partnership.

appealed the initial decision. NPRC agrees with the finding in the initial decision that TP's affiliation would result in a combination of Federal coal lease holdings and rail transportation within the purview of section 2(c). However, it argues that TRRC does not come within the 200-mile exception and that the present applications must therefore be denied. TRRC, on the other hand, argues that the Commission need not, and indeed ought not, be concerned with the section 2(c) issues in this proceeding. But TRRC also maintains that, if section 2(c) is considered, there is no violation of its provisions here. We will briefly outline the parties' various supporting arguments.

NPRC opposes the application on the ground that approval would violate section 2(c). In its view, an impermissible integration of rail transportation and Federal coal lease holdings would occur, due to TP's 42.075 percent interest in TRRC together with its interest (through its affiliates, Thermal and Wesco) in Federal coal

leases. It agrues that the 200-mile exception, relied upon by the ALJ, only permits a railroad to build a spur line to a mine operating under a Federal lease for use of the coal for railroad purposes (i.e. to fire steam locomotives).

NPRC asserts that the Commission cannot find that the proposed service is required or permitted by the public convenience and necessity if the operation would violate another Federal statute, because an illegal operation would be contrary to the public interest. Thus, NPRC contends that, before ruling on TRRC's application, the Commission must consider whether TRRC's operation would violate section 2(c).

It argues further that the Commission must make its own determination of the section 2(c) issue because the appropriate "sister agency" (DOI) has not, and will not, do so. NPRC believes that, since DOI has already issued the coal lease to Thermal, DOI would be unable to cancel it should TRRC become a railroad. Thus, according to NPRC, DOI would be unable to enforce section 2(c) to curb

a violation. NPRC relies on New Mexico Navajo Ranchers Ass'n v. I.C.C., 702 F.2d 227 (D.C. Cir. 1983) (New Mexico) for the principle that the Commission must make its own, independent interpretation of another Federal statute if the agency responsible for administering that statute is unwilling or unable to perform that function.

On the other hand, TRRC argues that the Commission does not have any jurisdiction to administer or enforce section 2(c). In TRRC's view, section 2(c) is directed only at the development of the public's mineral resources, and not at the operaton of a common carrier railroad. It views NPRC's arguments as an improper attempt to reverse the application of section 2(c). It argues that, should TRRC itself acquire a Federal lease, DOI would have authority to cancel the lease. As for the lease to Thermal, TRRC maintains that this lease was already reviewed by DOI and DOJ, who found no violation of section 2(c). Their determinations, TRRC argues, are binding on the Commission.

TRRC also argues that the Commission is not obligated to reflect the purpose of section 2(c) in its decision. In its view, the policies of section 2(c) are not related to the Commission's statutory objectives under the Rail Transporation Policy in 49 U.S.C. 10101a or section 10901 and do not have to be considered here. It argues that the New Mexico case is distinguishable, because the issues in that case were relevant to the public interest determination under section 10901, whereas section 2(c) is not. Another factor which sets this case apart from New Mexico, it asserts, is that DOI and DOT are continuing to monitor this proceeding and can act on the section 2(c) issue when TRRC becomes operational.

Finally, TRRC denies that any violation of section 2(c) would occur here. It argues that section 2(c) applies only to operating railroads and that TRRC, which has no operating assets or employees, does not currently fit within the statute. It asserts further that no Federal coal

lease holders are sufficiently related to (and integrated with) TRRC to have their leases imputed to TRRC. (It points cut that Cook Mt does not even hold any Federal lease, but is being developed exclusively on private reserves.) Moreover, even if the Thermal lease were imputed to it, TRRC agrees with the ALJ's conclusion that the 200-mile exception would apply.

DISCUSSION AND CONCLUSIONS

A rail carrier may construct and operate over a railroad line only if the Commission finds that the present or future public convenience and necessity require or permit these activities. 49 U.S.C. 10901(a).

> Undoubtedly, the purpose of these provisions is to enable the Commission, in the interest of the public, to prevent improvident and unnecessary

expenditures for the construction and operation of lines not needed to insure adequate service. In the absence of a plain declaration to that effect, it would be unreasonable to hold that Congress did not intend to empower the Commission to authorize construction of new lines to provide for shippers such competing service as it should find to be convenient or necessary in the public interest. * * * The Commission has recognized the advantages of competitive service to shippers especially in respect of a diversified car supply for the shipment of coal * * * that under some circumstances competition operates to stimulate better service and that reasonable competition may be in the public interest. Ches. & Ohio Ry. v. United

States, 283 U.S. 35, 42-43 (1931).

We adopt the reasoning and conclusions of the initial decision finding that that construction, operation, and financing of the subject line by TRRC meet appropriate public interest standards in 49 U.S.C. 10901 and 11301. The evidence of record shows a need for rail transportation to serve coal mines in the Tongue River Valley. This is a provident and necessary expenditure that will give shippers new rail service to their benefit and to the benefit of the public as well. TRRC has also demonstrated that it is able to construct and operate the line and satisfy the financial obligations to be incurred in the transaction.

The principle opponents to the proposal are landowners who are concerned about the adverse environmental impacts of the construction and operation of the line. These concerns are addressed in the FEIS,

which we are adopting. We also adopt the ALJ's finding to subject the construction and operation to the Mitigation Plan, set forth Appendix B to the initial decision, and we note that no party appealed that plan.

We disagree, however, with the conclusions in the initial decision on the consideration that must be given to section 2(c) in this proceeding.

The parties' arguments on the extent to which we must consider the section 2(c) issue hinge on their differing interpretations of New Mexico. NPRC claims that the New Mexico principle requires that we determine whether the proposal will constitute a violation of section 2(c) and, if so, deny the authority requested. TRRC maintains that New Mexico is not implicated here because the section 2(c) issue is not relevant to our required findings under section 10901. We conclude the neither argument accurately describes our responsibilities in this case, as outlined by the court in New Mexico.

In New Mexico, the court found that the

Commission, in authorizing two railroads to construct and operate a new rail line through land owned by Navajo Indians, failed to give sufficient consideration to issues raised under the American Indian Religious Freedom Act, 42 U.S.C. 1996, and the National Historic Preservation Act, 16 U.S.C. 470f. Those issues related to the validity of adequacy of consents given by the Indians for the use of those lands. Even though DOI was responsible for ruling on the validity of the consents, the court required the Commission to take evidence on the issue and make its own determination because DOI had failed to resolve the matter,[8] and the question was relevant to the Commission's inquiry under section 10901. 702 F.2d at

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8. Upon receipt of the rail authority, the railroad had commenced state action to condemn the Indian's land. However, neither the Commission nor DOI had ruled on the sufficiency of their commitment to protect historic and sacred Indian sites.

233. The court also required the Commission to consider the Federal policy of minimizing the disturbance of the Indian's quiet possession of their land, as reflected in two other Federal statutes, in deciding whether the proposed construction was consistent with the public interest. The court held "that the ICC must address itself to the federal policis embodied in . . . other statutes." Id. at 233 n.7.

The New Mexico decision cannot be limited in the manner TRRC suggests. Given the broad, public interest nature of our inquiry under section 10901, consideration must be given to the policies underlying any Federal statute reasonably brought into issue in such a case. The Federal policy embodied in the section 2(c) — separation of rail coal transportation from ownership of Federal coal leases in order to prevent railroad monopolization of the coal industry, (See DOJ memorandum, Executive Summary) — is clearly relevant to a determination whether an affiliate of Federal coal lease holders should be given rail authority. Therefore, we must consider the section 2(c)

issue. However, as explained below, we are not here required in this situation to rule definitively on whether our action could permit a potential future violation of section 2(c).

We do not read New Mexico as rigidly as NPRC concerning the proper means of accommodating or resolving potentially conflicting statutes administered by other Federal agencies. NPRC believes that we are limited to the two options that were discussed in New Mexico: i.e., either: (1) staying consideration of the rail license until the appropriate agency can resolve the matter in dispute; or (2) ruling on a statute that we do not administer, to be sure that no violation of that statute would occur. In the particular situation presented here neither of these courses is necessary or desirable. This situation is simply not like New Mexico, where another Federal statute and the policy underlying it would be ignored or defeated if the Commission were to issue the rail authority without first resolving the matter.

Any potential violation of section 2(c) that might occur here would not be immediate. Section 2(c) applies by its clear language only to operating railroads. Once certified, TRRC will not be able to comence operations for at least three years, since it must first build the line. Also, Thermal, does not expect to develop its Federal leasehold for several years after TRRC begins operation. Wesco has no plans as yet to develop its lease. These leases could also be voided as a result of pending court actions against DOI.[9] Thus, any ruling by us on this matter would be premature at this time.

Given the time available, the section 2(c) issue can

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9. These leases were cancelled and voided in Northern Cheyenne Tribe v. Hodel, supra, order of June 4, 1985. The Federal judge has stayed his order voiding the lease pending disposition of a motion to alter or amend his judgment, but all operations on the lands are enjoined in the meantime. Id., order of Oct. 7, 1985.

and should be fully addressed and resolved or remedied by the appropriate Federal agency in a timely manner. The ALJ was simply mistaken in his assumption that such a ruling could not be obtained. DOI has procedures for cancellation of leases which provide that failure to comply with the provisions of the Leasing Act [including section 2(c)] constitutes grounds for cancellation. 43 C.F.R. 3452.2-1(a). Moreover, DOJ may seek cancellation through a court enforcement action. 30 U.S.C. 184(h)(1). These prescribed remedies are still available should the leases issued to Thermal and Wesco be found to be in violation of section 2(c). Indeed, DOJ and DOI are both aware of TRRC's situation and will consult as necessary.[10] (Letter of September 26, 1983 from Assistant Attorney General William F. Baxter to Senator Baucus.)

Contrary to the impression of the ALJ, DOI has not

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10. We note that the DOJ and DOI are both on the service list in this proceeding.

made a final ruling on this matter. It simply determined that issuing a lease to Thermal did not violate section 2(c), because TRRC was not a certificated railroad. This certificate and decision will change that. As a result, DOI could rule on the changed circumstances created by TRRC's new status.

Because DOI can ultimately decide the section 2(c) question, a matter within its primary jurisdiction, we should not attempt to decide whether at some point in the future a violation could result. Declining to interfere with the jurisdiction and expertise of a sister agency is consistent with well established case law, see e.g., Consolidated Rail Corp. v. ICC, 646 F.2d 642, 650 (D.C. Cir.), cert. denied, 454 U.S. 1047 (1981); Delta Air Lines v. CAB, 543 F.2d 247, 260 (D.C. Cir. 1976); Air Line Pilots Ass'n v. CAB, 516 F.2d 1269, 1276 (2d Cir. 1975), and is especially appropriate here for several reasons.

Because the DOJ guidelines were not adopted by

DOI, we do not know what criteria DOI would use in applying section 2(c) to rail affiliates. With no clear guidelines to apply, our ruling could be contrary to what DOI might conclude.[11] Moreover, our determination would not be binding on DOI and DOJ.

Although we defer to DOI for a determination whether section 2(c) may ultimately be violated, we need not stay consideration of the rail certificate pending a determination by DOI. The situation here is unlike New Mexico, where the grant of authority created a situation that put Indian Lands in immediate jeopardy. In New

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11. For example, in determining control, DOJ has suggested a percentage of ownership presumption. That is not the way we approach issues of control under 49 U.S.C. 11343. See Maine Central R. Co. v. Amoskeag Co., 360 I.C.C. 147, 151 (1979). Rather, we focus on the ability to control, which is reflected in the power to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. Colletti - Control - Comet Freight Lines, 38 M.C.C. 95, 97 (1942).

Mexico, construction would have irreparably harmed historical and sacred Indian lands. Here, no rights will be violated by commencing construction. There is sufficient time for the appropriate authorities to determine whether a violation of section 2(c) would occur and, if so, order the lease cancelled or transferred prior to commencement of operations.

Moreover, a grant of rail authority pending subsequent determination by other agencies is consistent with past agency action. For example, in Cross-Sound Ferry Service, Inc. v. United States, 573 F.2d 725 (2d Cir. 1978), the Commission had granted a conditional certificate before the applicant had received all necessary safety and operating licenses from a variety of federal, state, and local government agencies. In upholding the Commission's action, the court found (at 733):

> The existence of the safety and accessibility problems in the proposed

sites, and the necessity of satisfying other regulatory bodies in these regards have been recognized and weighed by the Commission in its grant of the license and the time limitation it has imposed on the license. The certificate of public convenience and necessity is intended to be a necessary, but not a sufficient condition of operation. As such, it contemplates the simultaneous operation of other controls which are not primarily concerned with commercial utility.

See also, Concord Township, Delaware County v. United States, 625 F.2d 1068, 1074 (3d Cir. 1980) (obtaining a Commission certificate to operate a rail line "does not authorize construction in the flood plain . . . permits must [also] be obtained from other federal, state, and local agencies").

The evidence of record warrants issuance of the certificate of public convenience and necessity to TRRC to meet the demonstrated public need of shippers for rail service. We note that the immediate need is for service to mines located on private reserves. TRRC may commence construction of the line once this decision becomes effective, and it has compiled with the environmental conditions imposed in the initial decision which we adopt. However, since we are required to consider the policies of section 2(c) under New Mexico in ruling on TRRC's operation, we will impose a condition on the start of operations.

TRRC's start of operations is conditioned on submission of evidence sufficient to support a finding by the Commission that operation will not result in a violation of section 2(c). The condition may be satisfied by submission of a statement from DOI that there will not be a violation of section 2(c) when TRRC starts operations.

We emphasize that, although we have considered the policies of section 2(c), and therefore fashioned this condition, we do not intend to rule on whether TRRC's or its affiliates' activities violate section 2(c) because Congress has entrusted that function and responsibility to other Federal agencies, and we will not intrude into their jursidiction. Therefore, it will be TRRC's responsibility to assure that any questions arising under section 2(c) have been resolved before it can begin operating. We do not view this as a hardship on the TRRC, since it has indicated that it will take three years to complete construction of the line, and we expect it to be able to resolve any questions within that time.

FINDINGS

In Finance Docket No. 30186, we find that the present and future public convenience and necessity require or permit the construction and operation of a line of railroad described above (including either of the

alignments at Miles City and Ashland), subject to (1) mitigating conditions in Appendix B of the initial decision, and (2) the section 2(c) condition precedent to operation discussed above.

In Finance Docket No. 30186 (Sub-No. 1), to the extent we have jurisdiction, we find that the securities proposed to be issued: (a) are for a lawful object within the corporate purpose of TRRC and reasonably appropriate for that purpose; (b) are compatible with the public interest; (c) are appropriate for or consistent with the proper performance by TRRC of service to the public as a common carrier; and (d) will not impair the financial ability of TRRC to provide that service.

It is certified:

The present and future public convenience and necessity require or permit construction and operation by Tongue River Railroad Company of approximately 89 miles of rail line from two points near Ashland, MT to a point near Miles City, MT, subject to (1) mitigating conditions in

Appendix B of the initial decision, and (2) the section 2(c) condition precedent to operation discussed above.

It is ordered:

1. The appeals of the TRRC and NPRC are denied.

2. The initial decision, as modified here and subject to the environmental mitigation plan and section 2(c) conditions, is affirmed.

3. This decision will be effective 30 days after the date served.

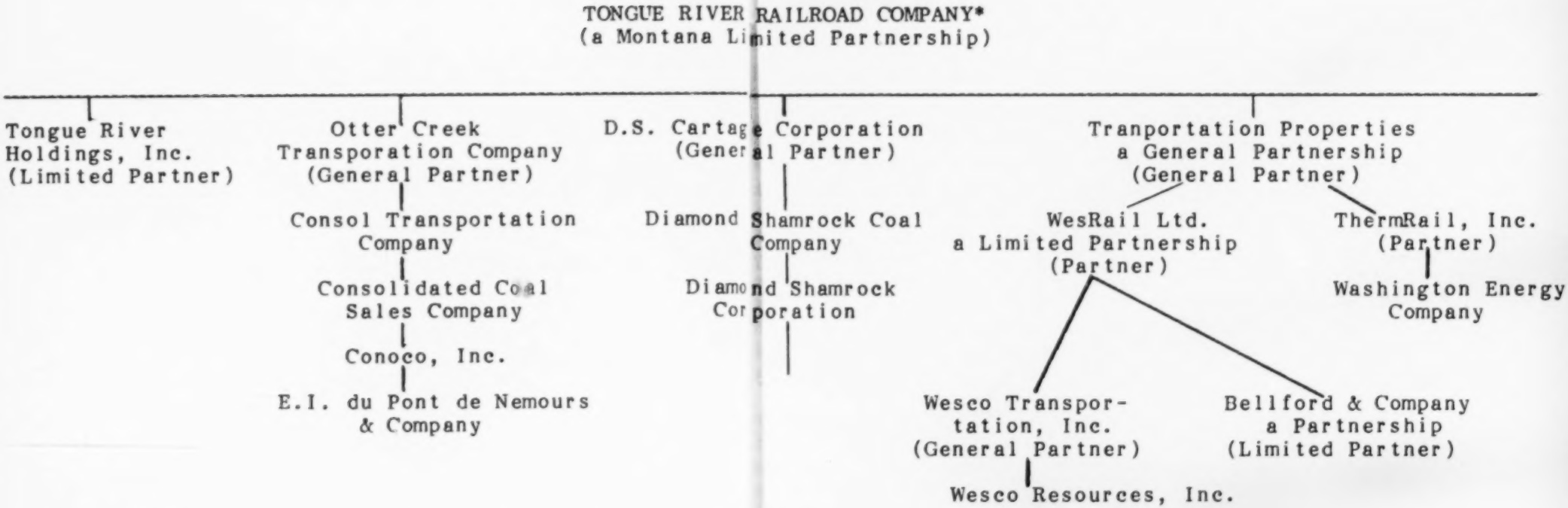
By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre and Lamboley.

(seal)

James H. Bayne

Secretary

CHART I - TRRC OWNERSHIP


TONGUE RIVER RAILROAD COMPANY*
(a Montana Limited Partnership)
Tongue River Holdings, Inc. (Limited Partner)
Otter Creek Transporation Company (General Partner)
Consol Transportation Company
Consolidated Coal Sales Company
Conoco, Inc.
E.I. du Pont de Nemours & Company
D.S. Cartage Corporation (General Partner)
Diamond Shamrock Coal Company
Diamond Shamrock Corporation
Tranportation Properties a General Partnership (General Partner)
WesRail Ltd. a Limited Partnership (Partner)
ThermRail, Inc. (Partner)
Washington Energy Company
Wesco Transportation, Inc. (General Partner)
Bellford & Company a Partnership (Limited Partner)
Wesco Resources, Inc.

* All companies are corporations unless otherwise indicated

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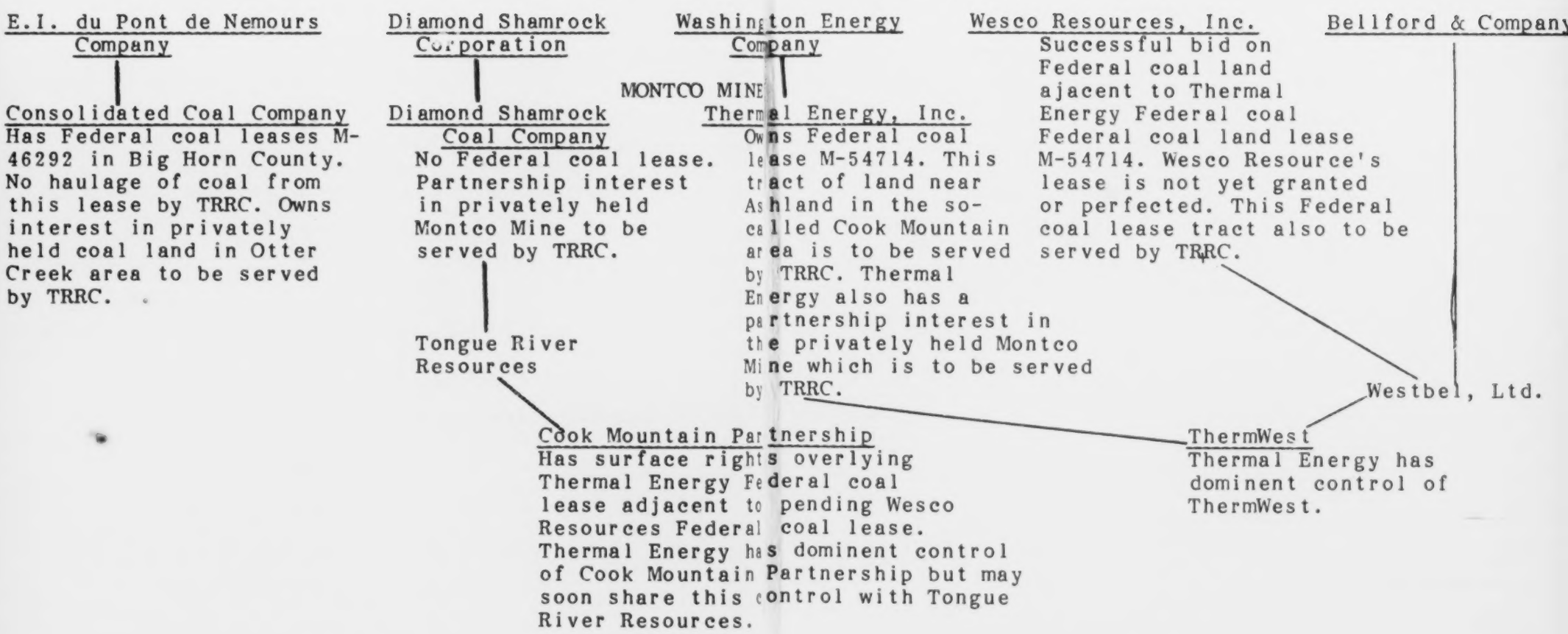
CHART II - COAL OWNERSHIP


E.I. du Pont de Nemours Company
Consolidated Coal Company
Has Federal coal leases M-46292 in Big Horn County. No haulage of coal from this lease by TRRC. Owns interest in privately held coal land in Otter Creek area to be served by TRRC.
Diamond Shamrock Corporation
Diamond Shamrock Coal Company
No Federal coal lease. Partnership interest in privately held Montco Mine to be served by TRRC.
Tongue River Resources
Washington Energy Company
MONTCO MINE
Thermal Energy, Inc.
Owns Federal coal lease M-54714. This tract of land near Ashland in the so-called Cook Mountain area is to be served by TRRC. Thermal Energy also has a partnership interest in the privately held Montco Mine which is to be served by TRRC.
Wesco Resources, Inc.
Successful bid on Federal coal land ajacent to Thermal Energy Federal coal Federal coal land lease M-54714. Wesco Resource's lease is not yet granted or perfected. This Federal coal lease tract also to be served by TRRC.
Bellford & Company
Westbel, Ltd.
Cook Mountain Partnership
Has surface rights overlying Thermal Energy Federal coal lease adjacent to pending Wesco Resources Federal coal lease. Thermal Energy has dominent control of Cook Mountain Partnership but may soon share this control with Tongue River Resources.
ThermWest
Thermal Energy has dominent control of ThermWest.

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No. 87-415

(3)

FILED
OCT 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NORTHERN PLAINS RESOURCE COUNCIL;
TONGUE RIVER AGRICULTURE PROTECTION ASSOCIATION;
ROSEBUD PROTECTIVE ASSOCIATION; and
TRI-COUNTY RANCHERS ASSOCIATION,
Petitioners,

v.

THE UNITED STATES OF AMERICA;
THE INTERSTATE COMMERCE COMMISSION; and the
TONGUE RIVER RAILROAD COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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October 8, 1987

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
HISTORY OF THE CASE	2
ARGUMENT	2
A. The Petitioners are not within the "Zone of Interest" Sought to be Protected by Section 2(c)	4
B. Other Grounds Advanced By the Petitioners Have No Merit	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) 3, 6, 7
Block v. Community Nutrition Institute, 467 U.S. 340 (1984) 3, 6
Center for Auto Safety v. NHSTA, 793 F.2d 1322 (D.C. Cir. 1986) 8
Clarke v. Securities Industry Association, —— U.S. ——, 107 S.Ct. 750 (1987) 3, 6, 7
Investment Company Institute v. Camp, 401 U.S. 617 (1971) 6
Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. ——, 106 S. Ct. 2860 (1986) 6, 8, 9
L. Singer & Sons v. Union Pacific Railroad Co., 311 U.S. 295 (1940) 9
National Coal Association v. Hodel, 825 F.2d 523 (D.C. Cir. 1987) 5, 6
Northern Indiana Public Service Commission v. Carbon County Coal Co., 799 F.2d 265 (7th Cir. 1986) 4, 5, 6
Northern Plains Resource Council, et al. v. Interstate Commerce Commission, et al. (No. 86-7344) 9th Circuit (May 12, 1987) 2
Pepsico, Inc. v. FTC, 472 F.2d 179 (2nd Cir. 1972) 8
Pittsburgh & W. Va. Ry. v. United States, 281 U.S. 479 (1930) 8
United States v. Elgin, Joliet & Eastern Ry. Co., 298 U.S. 492 (1936) 5
Wirth v. Seldin, 422 U.S. 490 (1975) 3
Water Transport Ass'n v. ICC, 819 F.2d 1189 (D.C. Cir. 1987) 3, 9

STATUTES

28 U.S.C. § 2344 9
Administrative Procedure Act, 5 U.S.C. § 702 9
Mineral Lands Leasing Act, 30 U.S.C. § 202 ..... *passim*

MISCELLANEOUS

58 *Congressional Record* 4739 (1919) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-415

NORTHERN PLAINS RESOURCE COUNCIL;
TONGUE RIVER AGRICULTURE PROTECTION ASSOCIATION;
ROSEBUD PROTECTIVE ASSOCIATION; and
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v.

THE UNITED STATES OF AMERICA;
THE INTERSTATE COMMERCE COMMISSION; and the
TONGUE RIVER RAILROAD COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Intervenor Tongue River Railroad Company (TRRC) agrees in general with Petitioners' "Statement Of The Case." However, Petitioners have inaccurately stated the basis for their appeal of the Interstate Commerce Commission's [variously ICC or the Commission] decision to the Court of Appeals by implying that environmental issues were the basis of appeal to the Court of Appeals (Petitioners' Brief p. 3-4). Petitioners initially opposed the TRRC applications to the Commission on several grounds, one of which was environmental.

However, in their appeal to the entire Commission, Petitioners did not appeal "the discussions and conclusions in the FEIS [Final Environmental Impact Statement] Mitigation Plan, or to the relevant analysis and conclusions in the initial decision [of the Administrative Law Judge]." Supp. App., p. 21d. The Petitioners did not seek review of the Commission's decision to the Court of Appeals on environmental grounds. Rather, the Court of Appeals expressly found that "the sole issue challenged by the NPRC on appeal is whether the ICC's decision violates section 2(c) of the Mineral Lands Leasing Act, 30 U.S.C. 202. We dismiss the appeal because the appellants lack standing to sue under section 2(c)." *Northern Plains Resource Council, et al. v. Interstate Commerce Commission, et al.*, No. 86-7344, 9th Circuit Court of Appeals, reprinted as Appendix A to Petitioners' Brief, p. 2A.

HISTORY OF THE CASE

Respondent Intervenor TRRC generally agrees with Petitioners' "History Of The Case." However, the continued reference to environmental matters and other grounds for appeal appears to be a veiled attempt to expand the single issue before this Court. Petitioners sought review in the Court of Appeals of the Commission's decision which they alleged countenanced a violation of Section 2(c) of the Mineral Lands Leasing Act, and on no other issue.

ARGUMENT

This case does not present any issue warranting review by this Court. The sole issue presented by the Petitioners for review is whether the Court of Appeals' decision denying standing to sue under section 2(c) of the Mineral Lands Leasing Act, 30 U.S.C. § 202, hereinafter "section 2(c)", is inconsistent with, and in conflict with recent decisions of this Court. The Petitioners have cited five cases as the basis for their contention that the Court of Appeals erred in its decision. As will be shown, close

scrutiny of these five cases discloses no support for the Petitioners' assertion.

In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970), this Court cautioned that "[g]eneralizations about standing to sue are largely worthless as such." Rather, in that and subsequent decisions where standing was a major concern, the Court has recognized that a more searching inquiry is required. Where, as here, the construction of a statute is involved "[t]he essential inquiry is whether Congress intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law." *Clarke v. Securities Industry Association*, —— U.S. ——, 107 S. Ct. 750, 757 (1987), quoting *Block v. Community Nutrition Institute*, 467 U.S. 340, 347 (1984).

In making this determination, this Court has consistently considered three elements: (1) whether the complaining party has suffered an "injury in fact" fairly traceable to the administrative action complained of; (2) whether the interests involved are arguably within the "zone of interests" sought to be protected by the statute or constitutional guarantee; and (3) whether Congress has manifested an intent to withhold judicial review from the class to which the complaining party belongs. *See, Clarke v. Securities Industry Ass'n, supra*, 107 S. Ct. at 754-757; *Block v. Community Nutrition Institute, supra*, 467 U.S. at 351 (*Block*); and *Association of Data Processing Organizations, Inc. v. Camp, supra*, 397 U.S. at 153. Unless all three elements are satisfied, the complaining party must be denied standing. *See, Wirth v. Seldin*, 422 U.S. 490, 499-500 (1975), and *Water Transport Ass'n v. ICC*, 819 F.2d 1189, 1192-1196 (D.C. Cir. 1987) (discussing and applying standard requirements in denying standing to a trade association contesting an adverse decision of the ICC). In dismissing the Petitioners' claim, the Court of Appeals found that the Petitioners did not fall within the "zone of interest"

to be protected by section 2(c). Thus, it was unnecessary for the Court of Appeals to apply the two remaining elements of the test.[1]

A. The Petitioners are not within the "Zone of Interest" Sought to be Protected by Section 2(c).

The Court of Appeals found that the Petitioners were not within the "zone of interests" intended to be protected by Congress in enacting section 2(c) of the Mineral Lands Leasing Act. (App. A, p. 3a) In reaching this conclusion, the court found that the purpose of section 2(c) was, in the court's words, ". . . because of a concern that, if railroads were allowed to own coal mines, they would discriminate in their rates for transportation against competing coal mines which depend on rail transportation." (*Id.*, p. 4a) In support of this conclusion, the court referenced the remarks of Senator LaFollette, a primary sponsor of the legislation that ultimately became section 2(c), *see* 58 *Congressional Record* 4739 (1919), and cited, with approval, the opinion of the Seventh Circuit in *Northern Indiana Public Service Commission v. Carbon County Coal Co.*, 799 F.2d 265 (7th Cir. 1986), which extensively discussed the history and purpose of section 2(c).

Although Petitioners argue strenuously that the decision of the ICC violates section 2(c) and that they have standing to raise that claim (Petitioners *Brief* at p. 15), nowhere do they point to any judicial decision, express statutory language, or the legislative history of section 2(c) which supports this claim for the simple reason that there is none.

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[1] Petitioners assert that the Court of Appeals recognized that petitioners "were adversely affected or aggrieved by the ICC decision." (Petitioners' Brief, p. 8) The Court of Appeals made no such finding of fact. The Court of Appeals found only that the Petitioners were landowners "arguably affected by the ICC's decision." (App. A, p. 4a)

Section 2(c) has never been authoritatively considered by this Court.[2] However, it has been addressed recently by the Court of Appeals for the District of Columbia Circuit in *National Coal Association v. Hodel*, 825 F.2d 523 (D.C. Cir. 1987). In *Hodel*, the Court of Appeals was presented with a challenge to a decision of the Secretary of the Interior consenting to a complicated exchange of public lands involving, among other things, the grant of a tract of public coal-bearing land to an affiliate of a railroad which, it was argued, violated section 2(c). The court, in determining its jurisdiction, discussed at some length whether the plaintiff, a trade association of major coal producers, had standing to assert a claim under section 2(c). The court found in *Hodel* that the plaintiff, as a coal producer association, had standing to sue under section 2(c) since they met the "zone of interest" test.

> The legislative history of section 2(c) provides a sufficient basis for locating plaintiffs within its protected zone. It was enacted out of fear 'that if railroads were allowed to own coal mines they would discriminate in transportation against competing coal mines which depended on rail transportation . . . .' *Northern Indiana Public Service Company v. Carbon County Coal Co.*, 799 F.2d 267, 271 (7th Cir. 1986) (balance of citation omitted)
>
> * * * *
>
> Since 'Congress [has] arguably legislated against the competition that the [plaintiffs] seek to chal-

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[2] This Court has, however, on several occasions addressed the background and strength of analogous federal policies reflected in the so-called "commodities clause", 49 U.S.C. § 10746, which restricts railroad ownership of commodities shipped by them. This provision, which is not an issue in this case, does not apply to affiliates of railroads unless one is the alter ego of the other. See United States v. Elgin, Joliet & Eastern Ry. Co., 298 U.S. 492, 501-04 (1936). Also see National Coal Association v. Hodel, infra, 825 F.2d at 526 (discussing the policy of the commodities clause in the context of section 2(c)).

> lenge,' plaintiffs have asserted an interest that bears a 'plausible relationship to the policies underlying the MLA. *Clarke*, 107 S.Ct. at 759 (quoting *Investment Company Institute*, 401 U.S. at 620). That is enough.[3] 825 F.2d at 527.

Petitioners suggest, in effect, that the Court should expand the 2(c) "zone of interest" test applied in *Hodel*. They cite the recent decision of this Court in *Clarke v. Securities Industry Association*, *supra*, for the proposition that the Court of Appeals' holding is at variance with this Court's trend to enlarge the class of persons with standing to appeal a judicial decision. [Petitioners' Brief p. 7]

As noted by the Petitioners, *Clarke* was decided after the Court of Appeals decision in this case. [Petitioners Brief, p. 12, n.4]. Nonetheless, Respondent Intervenor submits that the Court of Appeals decision in this case is fully consistent with *Clarke*.

In *Clarke*, *supra*, 107 S. Ct. at 756, this Court observed that "[t]he 'zone of interest' formula in *Data Processing* has not proved self-explanatory, but significant guidance can nonetheless be drawn from that opinion." [Footnote omitted.] In their broad and sweeping criticism of the decision of the Court of Appeals, Petitioners have made no effort to draw any real "guidance" from *Clarke* or other decisions of this court including *Data Processing*, *supra*, *Block*, *supra*, and *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. ——, 106 S. Ct. 2860 (1986). Although replete with quotations and citations from these opinions, the Petitioners' argument fails to

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[3] The recent decision of the Seventh Circuit in Northern Public Service Commission v. Carbon County Coal Co., supra, is instructive of Congressional intent of section 2(c). In its ruling, the court discussed at length the history and purpose of section 2(c). It concluded that Congress had not intended that section 2(c) be enforced through a private suit by claims irrelevant to its purpose. See 799 F.2d at 271-273.

recognize that the "zone of interest" test is not a talismanic formula of indiscriminate application. Rather, it requires an evidentiary determination of particular facts and statutes involved in a particular case. For example, in *Clarke*, *supra* and *Data Processing*, *supra*, the Court undertook such a detailed analysis of the particular statutes involved. In both cases, the Court found that, although the legislation did not expressly provide for judicial review, the analysis supported the parties' claim that they were within the "zone of interest" that Congress sought to protect. As the Court explained in *Clarke*, *supra*, 107 S.Ct. at 759,

> 'Congress [has] arguably legislated against competition that [respondent seeks] to challenge.' *Investment Company Institute*, 401 U.S. at 620, 91 S.Ct. at 1093, by limiting the extent to which banks can engage in the discount brokerage business and hence limiting the competitive impact on nonbank discount houses.

In contrast, no such right was found in *Block*, *supra*, holding that consumers, even though affected by the impact of the milk marketing orders issued by the Secretary of Agriculture, lacked standing to contest those orders. *See*, 467 U.S. at 348.

The Court of Appeals gave careful consideration to the distinctions made in these cases. *See*, App. A, p. 3a-4a. In contrast, the Petitioners treat all of these decisions as a seamless web without distinction when such is not the case. In doing so, the Petitioners assert that the decision of the Court of Appeals is "contrary to the trend enunciated by this Court in its decisions which enlarges that class," citing *Data Processing*, *supra*. [Petitioners' Brief, p. 7]. Petitioners are simply wrong in this assertion for, as the Court pointed out in *Clarke*, *supra*, 107 S.Ct., at 757,

> In cases where the plaintiff is not itself the subject of the contested action, the [zone of interest] test

> denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes *implicit* in the statute that it cannot be reasonably assumed that Congress intended to permit the suit. [emphasis added]

There is nothing "implicit in the statute" [section 2(c)] at issue here that demonstrates any intent on the part of Congress to confer a right of action on the landowner interests represented by the Petitioners. Thus, the Court of Appeals was clearly correct in holding that the appellants "are not within the 'zone of interests' protected by section 2(c)." App. A, p. 4a.

B. Other Grounds Advanced By the Petitioners Have No Merit.

As discussed above, the Court of Appeals did not find it necessary to apply the two remaining elements of the standing test. However, the Petitioners seem to argue the contrary. They cite *Japan Whaling Ass'n v. American Cetacean Soc., supra*, for the proposition that their participation in this case "presumptively" entitles them to judicial review (Petitioners' Brief, at p. 13). That the Petitioners were a "party" to the proceedings before the Commission is not in dispute. However, it is well settled that the mere fact that a party participated in a proceeding before the Commission does not in and of itself confer a right of action in the courts. *Pittsburgh & W. Va. Ry. v. United States*, 281 U.S. 479, 486 (1930). *Also see, Center for Auto Safety v. NHSTA*, 793 F.2d 1322, 1329 (D.C. Cir. 1986), applying *Pittsburgh* in a contemporary setting. As put by the Second Circuit in *Pepsico, Inc. v. FTC*, 472 F.2d 179, 186 (2nd Cir. 1972),

> The notion that being a 'party' before an agency either automatically confers or is a necessary condition of the right to judicial review has in fact been dead since [*Pittsburgh*].

For Petitioners to prevail, they must first show that they are an "aggrieved" party under section 10 of the

Administrative Procedure Act, 5 U.S.C. § 702, and 28 U.S.C. § 2344, which governs judicial review of the Commission's orders. To be an aggrieved party, they must first satisfy the traditional "zone of interest" test of standing discussed previously. *See*, pp. 4-8 herein *supra*; *Water Transport Ass'n v. ICC*, 819 F.2d 1189, 1193-97 (D.C. Cir. 1987). This Court held the parties to such a test in *Japan Whaling Ass'n*, *supra*, finding first that the respondent was sufficiently "aggrieved" by the agency's action and that it had suffered an "injury in fact" (*Japan Whaling Ass'n*, *supra*, p. 8 n.4).[4] Therefore, that decision offers no support for the relief sought by Petitioners in this case.

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[4] Petitioners also cite this Court's decision in L. Singer & Sons v. Union Pacific Railroad, 311 U.S. 295 (1940) to show what interests one has to assert to obtain "standing" under the Transportation Act of 1920. This cause arose over a complaint by a shipper that the defendant railroad was constructing new rail facilities to a competitor without prior approval of the Commission, as required under former sections 1(18)-(21) of the Interstate Commerce Act, now 49 U.S.C. § 10901. The Court affirmed the Circuit Court stating that the Petitioners there, as a competing shipper, were without "standing" to maintain the suit as "parties in interest".

As explained in Singer, 311 U.S. at 304, "an individual may have some peculiar interest which may be directly and materially affected by alleged unlawful action". The Court concluded the "legal interest" test by stating, "If such circumstances are shown he may sue; he is then 'party in interest' within the meaning of the statute. In the absences of the circumstances he is not such a party". Ibid.

Even though the "legal interest" test has been superseded by the "zone of interest" test first set forth in Data Processing, *supra*, the result would be the same. As explained above, Petitioner has not shown to any court that it has any peculiar interest which may be directly and materially affected by the alleged unlawful action.

CONCLUSION

In view of the foregoing, this case clearly does not warrant review by the Court.

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No. 87-415

In the Supreme Court of the United States

OCTOBER TERM, 1987

NORTHERN PLAINS RESOURCE COUNCIL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Whether petitioners have standing to challenge a decision of the Interstate Commerce Commission that authorized contruction of a rail line, when petitioners' challenge is based solely on a provision of the Mineral Lands Leasing Act of 1920 that bars "a corporation operating a common-carrier railroad" from holding a federal coal lease, and none of the petitioners is a member of any group the statute was intended to protect.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Association of Data Processing Serv. Orgs., Inc. v. *Camp*, 397 U.S. 150 (1970) 5

Block v. *Community Nutrition Institute*, 467 U.S. 349 (1984) 6

Clarke v. *Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987) 6

National Coal Ass'n v. *Hodel*, 617 F. Supp. 584 (D.D.C. 1985), aff'd, 825 F.2d 523 (D.C. Cir. 1987) 5

Northern Cheyenne Tribe v. *Hodel*, No. CV-82-116-BLG (D. Mont. Oct. 6, 1986) 2

Northern Indiana Public Service Co. v. *Carbon County Coal Co.*, 799 F.2d 265 (7th Cir. 1986) 5

Water Transport Ass'n v. *ICC*, 819 F.2d 1189 (D.C. Cir. 1987) 4

Statutes and regulation:

Administrative Procedure Act, 5 U.S.C. (Supp. IV) 702 .. 4

Hobbs Act, 28 U.S.C. 2344 4

Mineral Lands Leasing Act of 1920, 30 U.S.C. (& Supp. III) 181 *et seq.*:

30 U.S.C. 184(h)(1) 6

30 U.S.C. 189 6

30 U.S.C. 202 (§ 2(c)) 2, 3, 4, 5, 6, 7

49 U.S.C. 10901 ..... 1, 7

49 U.S.C. 10901(a) 1

49 U.S.C. 11301 ..... 2, 7

Statutes and regulation—Continued: Page

43 C.F.R. 3452.2-1(a) 6

Miscellaneous:

58 Cong. Rec. 4739 (1919) 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 817 F.2d 758 (Table). The decision of the Interstate Commerce Commission (Pet. Supp. App. 1d-51d) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1987. A petition for rehearing was denied on June 11, 1987 (Pet. App. 1b). The petition for a writ of certiorari was filed on September 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 49 U.S.C. 10901, a railroad may construct and operate a railroad line "only if the Commission finds that the present or future public convenience and necessity require or permit the construction * * * and operation of the railroad line" (49 U.S.C. 10901(a)). This case arises

from an application by the Tongue River Railroad Company (TRRC) to construct and operate an 89-mile rail line between two cities in Montana (Pet. Supp. App. 1d).[1] The area that TRRC's proposed rail line was designed to serve contains reserves of mineable low sulfur coal, estimated at 10 billion tons, that are owned by various private and public interests including the United States and the State of Montana; the area currently lacks suitable transportation to serve these coal reserves (*id.* at 3d).

TRRC's application was opposed by petitioner organizations on behalf of nearby landowners and other interested individuals. Petitioners contended, inter alia, that TRRC's proposal is barred by Section 2(c) of the Mineral Lands Leasing Act of 1920, 30 U.S.C. 202. That Section generally prohibits any company or corporation that operates a common carrier railroad from holding a permit or lease for any federal coal deposits unless the coal is used exclusively to meet the railroad's fuel needs (Pet. App. 1c). Petitioners contended that a violation of Section 2(c) would exist because one of TRRC's general partners, Transportation Properties, is affiliated with Thermal Energy, Inc., the holder of a disputed federal coal lease.[2]

Following public hearings, an ICC administrative law judge (ALJ) concluded that Section 2(c) of the Leasing Act would not be violated (Pet. Supp. App. 25d-28d). The ALJ granted TRRC's applications, subject to mitigation measures designed to offset any adverse effects on adjacent landowners.

2. The only issue raised on appeal to the Commission was the ALJ's construction of Section 2(c) (Pet. Supp.

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[1] TRRC also sought authority under 49 U.S.C. 11301 to issue securities to finance construction of the rail line.

[2] The coal lease in question (M-54714) has been suspended on grounds unrelated to Section 2(c). *Northern Cheyenne Tribe* v. *Hodel*, No. CV-82-116-BLG (D. Mont. Oct. 6, 1986).

App. 2d, 21d; see Pet. 5 n.2). The Commission modified and, as modified, affirmed the ALJ's initial decision. The Commission stated (Pet. Supp. App. 40d-41d) that Section 2(c) prohibits only railroad *operations,* which could not begin for at least three years (until construction is completed). Moreover, as the validity of the federal coal lease involved was in question (see note 2, *supra*), any potential violation of Section 2(c) by TRRC would be neither an immediate nor certain outcome of approving the applications. Under the circumstances, the Commission decided to defer to the Department of the Interior, the agency charged with administering the Leasing Act, on the Section 2(c) issue. The Commission explained that in the absence of Department of Interior guidelines, there could be no assurance that it could resolve the Section 2(c) issue in a manner consistent with the Interior Department's interpretation (Pet. Supp. App. 42d-43d).[3] The Commission therefore authorized construction of TRRC's proposed line (for which it found that a clear need existed (*id.* at 43d-45d)) but withheld approval for the line to become operational until the Section 2(c) issue is resolved.

3. Petitioners sought review of the Commission's decision in the United States Court of Appeals for the Ninth Circuit. Petitioners' sole contention on appeal was that the agency's decision was contrary to Section 2(c) of the Mineral Lands Leasing Act (Pet. 5 n.2; Pet. App. 2a).

The court of appeals dismissed the petition for review on the ground that petitioners lack standing to raise the Section 2(c) issue. The court of appeals stated that peti-

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[3] Prior to 1980, the Department of the Interior had applied an alter ego test to determine whether an affiliated company should be considered a railroad for purposes of Section 2(c). In 1980, the Department of Justice proposed a more expansive set of standards. After reviewing that proposal, the Interior Department decided that it would no longer apply the alter ego test, but it expressly declined to adopt other standards (see Pet. Supp. App. 24d-25d).

tioners "must establish that [they have] suffered an injury in fact and that [their] interests are arguably within the zone of interests to be protected or regulated by the statute that the plaintiff claims the agency violated" (Pet. App. 3a). As Section 2(c) was passed as a result of "[c]oncerns over railroad monopolization of the coal industry," the court concluded that the statute reflected Congress's fear that "if railroads were allowed to own coal mines, they would discriminate in their rates for transportation against competing coal mines which depend on rail transportation" (Pet. App. 3a). The court therefore concluded that Section 2(c) was intended to protect independent coal companies from unfair competition and, because petitioners' members are landowners who neither compete with TRRC nor are in the coal business, petitioners are "not 'within the zone of interests protected' by [S]ection 2(c)" (Pet. App. 3a-4a (citation omitted)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

The Hobbs Act, 28 U.S.C. 2344, expressly states that only a "party aggrieved" by an agency order may seek judicial review. See *Water Transport Ass'n* v. *ICC*, 819 F.2d 1189, 1192 (D.C. Cir. 1987); 5 U.S.C. (Supp. IV) 702 (granting standing to a person "aggrieved by agency action within the meaning of a relevant statute"). While petitioners participated in the agency proceedings and clearly are parties, they are not aggrieved within the meaning of the Hobbs Act and the Administrative Procedure Act.

In applying the statutory standard for judicial review, courts " 'have engaged in traditional standing doctrine analysis.' " *Water Transport Ass'n* v. *ICC*, 819 F.2d at 1193 (citation and footnote omitted). Under that analysis, before petitioners may obtain judicial review of the Com-

mission's ruling on the Section 2(c) issue, they must establish (1) that the agency's action caused them "injury in fact" and (2) that this injury was "arguably within the zone of interests to be protected or regulated by the statute" upon which they rely. *Association of Data Processing Serv. Orgs., Inc.* v. *Camp,* 397 U.S. 150, 151-153 (1970).

Petitioners' challenge to the Commission's decision is based solely on Section 2(c) (Pet. 5 & n.2). Assuming they suffered "injury in fact,"[4] petitioners do not fall within the zone of interests protected by the statute. As is well recognized, Section 2(c) was enacted out of fear "that if railroads were allowed to own coal mines they would discriminate in transportation against competing coal mines which depend on rail transportation * * *." *Northern Indiana Public Service Co.* v. *Carbon County Coal Co.,* 799 F.2d 265, 271 (7th Cir. 1986); see 58 Cong. Rec. 4739 (1919) (remarks of Sen. LaFollette); *National Coal Ass'n* v. *Hodel,* 617 F. Supp. 584, 588 (D.D.C. 1985), aff'd, 825 F.2d 523 (D.C. Cir. 1987).

Petitioners and their members are not in the coal business, nor are they involved in the production or

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[4] Contrary to petitioners' assertion (Pet. 8), the court of appeals did not reach the question whether petitioners suffered injury in fact. The court simply stated (Pet. App. 4a) that, for purposes of its analysis, petitioners were "arguably affected by the ICC's decision." Any injury to petitioners' members would relate to the concerns they raised regarding the condemnation of land for the right-of-way and the adverse environmental impacts caused by construction of the rail line. But petitioners do not challenge the Commissioner's decision on either of those grounds. The sole challenge petitioners pressed before the Commission, the court of appeals and this Court – the alleged violation of Section 2(c) – does not relate in any way to the agency's findings on the need for the rail line or on the most effective means of mitigating potentially adverse environmental consequences (Pet. 5 n.2).

distribution of energy.[5] The landholding interests petitioners seek to protect (against condemnation or adverse environmental consequences) are wholly distinct from the policies underlying Section 2(c). As petitioners state (Pet. 11), a party may fall within the protected zone of interests even though there is "no indication of congressional purpose to benefit the would-be plaintiff" (*Clarke* v. *Securities Industry Ass'n*, No. 85-971 (Jan. 14, 1987), slip op. 10-11), but that would not suffice to confer standing when "the plaintiff's interests are so marginally related to * * * the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit" (*id.* at 10).[6] Petitioners' interest in this case is not even marginally related to the purposes of Section 2(c). Indeed, the means ordinarily employed to avoid or cure a Section 2(c) violation—cancellation or divestiture of the federal coal lease, severance of the rail line's affiliation with the lease holder, or substitution of another applicant—would have no effect on petitioners' interests. Thus, the court of appeals properly found that petitioners are not within the zone of interests protected by Section 2(c).[7]

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[5] Indeed, no potential competitor in either the railroad or coal business has complained of a potential violation of Section 2(c) by TRRC in this case.

[6] This Court has described as the "essential inquiry" the question whether Congress "intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law." *Clarke* v. *Securities Industry Ass'n*, slip op. 10 (quoting *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 347 (1984)). Surrounding landowners are clearly not a class Congress relied upon to enforce Section 2(c). Congress specifically provided for the Interior and Justice Departments to monitor Section 2(c) compliance. 30 U.S.C. 184(h)(1), 189; see 43 C.F.R. 3452.2-1(a).

[7] There is no merit to petitioners' attempt to circumvent the court of appeals' standing analysis by arguing (Pet. 15) that they are generally within "the zone of interests to be protected by the Transportation

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Act, 49 U.S.C. § 10901 and 49 U.S.C. § 11301." The sole ground upon which petitioners challenge the agency's Section 10901 and 11301 findings is that those findings would permit a violation of Section 2(c) of the Mineral Lands Leasing Act (see Pet. 5).

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